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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 313.~~ 40

LOUIS SANDS, PLAINTIFF IN ERROR,

vs

THE MANISTEE RIVER IMPROVEMENT COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED SEPTEMBER 25, 1884.

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1 STATE OF MICHIGAN:

The Circuit Court for the County of Manistee.

THE MANISTEE RIVER IMPROVEMENT COMPANY *vs.* LOUIS SANDS.

At a session of said court held on the seventh day of August, A. D. 1883, at the court-house in the city of Manistee, in said county, before the Hon. J. Byron Judkins, circuit judge, and a jury lawfully impanneled to try the said cause, the issue in this cause came on to be tried, and thereupon the plaintiff, to maintain and prove the issue on its part, offered in evidence a certified copy of the articles of association of the plaintiff, for the purpose of showing the portion of the river proposed to be improved; to the introduction of which in evidence the said defendant, by his counsel, objected upon the ground that it was irrelevant and immaterial, which objection was then and there overruled by the said court; to which ruling and decision the said defendant, by his counsel, then and there duly excepted.

Thereupon the said articles of association were received and read in evidence, and are as follows, namely:

EXHIBIT "A."

Know all men by these presents that we, the undersigned, do hereby associate ourselves together, in accordance with an act of the Legislature of the State of Michigan, approved by the Governor of the State on the 5th day of April, 1869, entitled "An act to
2 authorize the formation of corporations for the purpose of improving the navigation of rivers; and we do hereby certify as follows, to wit:

I.

The name of this corporation shall be and is "The Manistee River Improvement Company."

II.

The stream and section of the stream to be improved is Manistee river and its tributaries, especially those connecting with Fife and Portage Lakes from the east line of Manistee county to the head waters of said Manistee river.

III.

The amount of capital stock of this company shall be and is one hundred thousand dollars, which capital stock is divided into one thousand shares of one hundred dollars each.

IV.

The names and residences of the stockholders and the number of shares held by each of them are as follows, to wit:

Names.	Residences.	No. Shares.
Geo. W. Robinson	Manistee	One hundred.
Wm. Wheeler	"	Fifty.
Robert M. Risdon	"	One hundred.
Daniel D. Ruggles	"	Fifty.
Neil Leitch	Filer	Fifty.
Horace Butters	Stronach	Fifty.
Byron M. Cutcheon	Manistee	Ten.
Geo. W. Bullis	"	Ten.

V.

The names of the first directors are as follows, to wit:

Geo. W. Robinson, Robert M. Risdon, William Wheeler, Horace Butters, Byron M. Cutcheon.

VI.

3 The office of said company, where their business is transacted, is located in the city of Manistee, in the county of Manistee, State of Michigan.

VII.

The term of existence of the company shall be thirty years.

GEO. W. ROBINSON. [L. S.]
WM. WHEELER. [L. S.]
ROBERT M. RISDON. [L. S.]
D. D. RUGGLES. [L. S.]
NEIL LEITCH. [L. S.]
HORACE BUTTERS. [L. S.]
BYRON M. CUTCHEON. [L. S.]
GEO. W. BULLIS. [L. S.]

5-cent stamp.
March 16th, 1870.

STATE OF MICHIGAN, }
County of Manistee, } ss:

On this the 16th day of March, 1870, before me, county clerk in and for Manistee county, personally appeared the above-named Geo. W. Robinson, Wm. Wheeler, Robert M. Risdon, D. D. Ruggles, Neil Leitch, Horace Butters, Byron M. Cutcheon, and Geo. W. Bullis, to me known to be the person described in and who executed the foregoing articles of association, and severally acknowledged the same to be their free act and deed.

WM. DUNHAM, [L. S.]
Co. Clerk.

STATE OF MICHIGAN, } ss:
County of Manistee, }

I, T. Geo. Hislop, deputy clerk of the county of Manistee and the courts thereof, do hereby certify that I have compared the foregoing copy of articles of association of the Manistee River Improvement Company with the original of record in my office, and that
4 the same is a correct transcript therefrom and the whole of such original.

Witness my hand and seal of the circuit court of the county of Manistee, at the city of Manistee, this 29th day of August, A. D. 1881.

T. GEO. HISLOP, *Clerk.*

The said plaintiff, further to maintain and prove the issue on its part, next offered in evidence a certified copy of the plan for the improvement of the Manistee river, which plan was submitted to the board of control, and had thereon the endorsement of the board of control approving of said plan and authorizing the making of the improvements; which indorsement was offered as a part of the plan and reads as follows:

Part of Exhibit "B."

"The undersigned, members of the board of control of the Sault Ste. Mary's ship canal, have examined the accompanying map, showing the proposed improvements of the Manistee river to be made by the Manistee River Improvement Company, as further explained in the report of D. D. Ruggles and H. S. Udell to said company, accompanying the same and filed herewith; and we, the said board, do hereby approve of said plans for said improvement, and do hereby give our consent to the construction of the improvement proposed in the manner shown by the records of this board.

HENRY P. BALDWIN,
EBENEZER O. GROSVENOR,
WM. HUMPHREY,
Board of Control.

To the introduction of which in evidence the said defendant, by his counsel, then and there objected upon the ground that
5 said paper was irrelevant and immaterial to the issue. Said objection was overruled by the court; to which ruling and decision of the said court the said defendant, by his counsel, then and there duly excepted.

And thereupon the said plan and approval of the board of control were accepted and read in evidence.

The said plaintiff, to further maintain and prove the issue on its part, offered in evidence an assent of the Governor and attorney general to the improvement of said river upon the plan proposed. The genuineness of said signatures were admitted by the defendant, but the said defendant, by his counsel, objected to the introduction of said paper upon the ground that it was irrelevant and immaterial.

The court thereupon overruled said objection and admitted said paper in evidence; to which ruling and decision the said defendant, by his counsel, then and there excepted.

The plaintiff also offered in evidence a certified copy of the records of the board of control for their action taken July 6th, 1870.

Said action of the board of control and the assent of the Governor and attorney general read as follows:

EXHIBIT "C."

LANSING, MICH., *July 6th*, 1870.

The board of control met at the office of the secretary of state at 7½ p. m.

Present: H. P. Baldwin, Governor; E. O. Grosvenor, treasurer; Wm. Humphrey, aud. gen.

The Manistee River Improvement Company appeared before the board, by its president and secretary, Byron M. Cutcheon, and asked the assent thereof to the construction of certain
6 improvements to the navigation of the Manistee river, in the counties of Wexford, Missaukee, Kalkaska, and into Crawford county, as set forth in the articles of association of said company (a copy of which is now on file in the office of the secretary of state), and specified in the report of Henry S. Udell and D. D. Ruggles, and shown by the accompanying map (also on file in the office of the secretary of state).

The consent of the Governor and the attorney general to such improvement having been obtained, as required by sec. 4, act 149, p. 287, laws of 1869, and the maps and plans thereof having been presented to and examined by said board, as required by the act under which said corporation was organized, and it appearing that the construction of said improvement would be a public benefit, and that the Manistee River Improvement Company is a proper company to make the same, the board of control assents to the construction of such improvements in accordance with the plans submitted for examination and designated on the map thereof, and required that the said work and improvement be fully completed on or before the thirty-first day of December, 1874, as follows:

There shall be completed within the year 1870 all work and improvements specified in a report made to the Manistee River Improvement Company by D. D. Ruggles and H. S. Udell, which report is on file in the office of the secretary of state, commencing on the east line of the county of Manistee and including what in said report are termed "jams," numbered 22, 21, 20, 19, and 18, and the parts of the river, inclusive, as surveyed and detailed in said report and shown on the map accompanying it.

7 Within the year 1871 shall be completed all works and improvements included in "jams" No. 17, 16, 15, 14, 13, and 12, as described in said report.

Within the year 1872 shall be completed "jams" 11, 10, 9, 8, 7, 6, 5, 4, 3, 2, and 1, as described in said report.

Within the year 1873 all work and improvements included in said report and noted or marked on the margin thereof "No. 2."

The entire balance of the work and improvements detailed in said report to be completed within the year 1874.

Board adjourned.

WM. HUMPHREY,
Sec. of Board of Control.

EXHIBIT "D."

Assent.

The undersigned hereby give their assent to the construction of the improvements of the Manistee river by the Manistee River Improvement Company, as shown by the map and plan filed by said company and approved by the board of control of the Sault Ste. Mary's Falls ship canal.

Lansing, June 6th, 1870.

HENRY P. BALDWIN,
Governor.
DWIGHT MAY,
Attorney General.

And, further to maintain and prove the issue on its part, the said plaintiff offered in evidence a certified copy from the records of the board of control showing their action taken on February 26th, 1879, purporting to accept the said improvements; to the introduction of which in evidence the said defendant, by his counsel, then and there objected, upon the ground that the same were irrelevant and immaterial; which objection was then and there overruled by the court; to which ruling and decision of the court the said de-
8 fendant, by his counsel, then and there excepted.

Thereupon the said paper was received in evidence, and read as follows:

EXHIBIT "E."

At a meeting of the board of control of the St. Mary's Falls ship canal, held in the city of Lansing, at the office of the board of State auditors, on Tuesday, the 26th day of February, A. D. 1879.

Present: Hon. Charles M. Croswell, Gov.; Benjamin D. Pritchard, treas.; W. Irving Latimer, aud. gen.

In the matter of the completion of the work of the Manistee River Improvement Company in the improving of the navigation of the Manistee river by the deepening of the channels thereof and the construction of the dams therein and canals to connect therewith from the east line of the county of Manistee to the north line of section 18, town. 28 north, of range four west, and the acceptance thereof by the board of control of the St. Mary's Falls Ship Canal Company, and the determination and adjudication by the said board of control that the said improvements are useful to the public, and that tolls should be paid for the use thereof.

Mr. T. J. Ramsdell, of Manistee, appeared before the board in re-

lation to the above matter, and offered proofs as to the completion of the work. He also submitted to the board affidavits of Henry S. Udell, W. H. Hall, R. G. Peters, which were placed on file, and thereupon the board unanimously adopted the following:

It satisfactorily appearing to said board of control that said
9 improvements are of public use, and have been fully completed within the time prescribed by the board of control at the time said plans were approved, except the building of a dam on section 19, the building of which has heretofore been extended by this board until December 31st, 1882:

It is, therefore, adjudged by said board that the improvements designated in the original plan, which *as* approved by this board and survey of said company, have been fully completed, except the building of a dam as aforesaid, and that in the opinion of said board of control said work is useful, and that tolls should be paid for the use thereof, and the said improvements ought to be, and hereby are, accepted by said board of control.

W. IRVING LATIMER,
Sec. Board of Control.

Thereupon the plaintiff, further to maintain and prove the issue on its part, offered in evidence a certified copy of the action of the board of control, taken on the 11th day of April, 1879, purporting to fix the rates of toll.

Also the action of the board of control taken on April 30th, 1879, purporting to fix the rates of toll in range number four.

Also the action of the board of control under date of March 28th, 1877, purporting to fix the rates of toll for that year. Thereupon the defendant, by his counsel, objected to the introduction of said records in evidence upon the ground that they were irrelevant and immaterial, and that they were insufficient to entitle the company to collect any tolls, and that as to the year 1877 there was no adjudi-
cation by the board that the improvements had been made or
10 were useful, in their opinion, so that the tolls should be collected; that the law requires an adjudication of that fact, and the action of the board of control contains none.

Thereupon the said court overruled said objection and admitted the said papers in evidence; to which ruling and decision of the said circuit judge the defendant, by his counsel, then and there excepted.

The said records, being read in evidence, were as follows:

EXHIBIT "F."

At a meeting of the board of control of the St. Mary's Falls ship canal, held in the city of Lansing, at the office of the auditor general, on Friday, the 11th day of April, 1879—present, Hon. Benjamin D. Pritchard, treas.; Hon. W. Irving Latimer, aud. gen.—the following rates of tolls were fixed for the ensuing year upon all logs put into the Manistee river, as follows:

Ranges 5, 6, and 7, 15 cents per M feet, board measure.

Range 8, 13 cents per M feet, board measure.
Range 9, 10 cents per M feet, board measure.
Range 10, 8 cents per M feet, board measure.
Ranges 11 and 12, 7 cents per M feet, board measure.

W. IRVING LATIMER.
Sec'y of Board of Control.

EXHIBIT "F F."

At a meeting of the board of control of the St. Mary's Falls ship canal, held in the city of Lansing, at the office of the auditor general, on Wednesday, April 30th, 1879—present, Hon. Chas. M. Croswell, Governor; Hon. B D. Pritchard, State treasurer; Hon. W. Irving Latimer, aud. gen'l—the following resolution was adopted:

Resolved, That the following rates of tolls be fixed for the ensuing year upon all logs put into the Manistee river, in range No. 4, as follows:

Fifteen cents per thousand feet, board measure; and that a copy of this resolution be transmitted to the secretary of said Manistee River Improvement Company.

W. IRVING LATIMER,
Sec'y Board of Control.

PLAINTIFFS' EXHIBIT No. "12."

LANSING, *March 28th*, 1877.

Board of control of St. Mary's Falls ship canal met at the office of the aud. gen'l, in the city of Lansing, March 28th, 1877, at 12 a. m.

Present: Hon. Wm. B. McCreery, treas.; Hon. Ralph Ely, sec'y.

Board had also under consideration the report of the Manistee River Improvement Company for 1877, which was accepted, and rates of tolls for the ensuing year fixed as follows:

Ranges	5, 6, & 7,	15	cents per 1,000 feet,	board measure.
"	8, 13	"	"	"
"	9, 10	"	"	"
"	10, 8	"	"	"
"	11 & 12, 7	"	"	"

The plaintiff's counsel also offered in evidence the action of the board of control, under date of July 31st, 1878.

To the introduction of which in evidence the said defendant, by his counsel, then and there objected upon the same ground last above stated; and said objection being overruled by the court, the said defendant, by his counsel, then and there duly excepted to the said ruling and decision.

12 Thereupon the said action of the board of control was received and read in evidence, and read as follows:

PLAINTIFF'S EXHIBIT "13."

JULY 31ST, 1878.

Board of control met in the city of Lansing, July 31st, 1878.
Present: Gov. C. M. Croswell, treas.; Wm. B. McCreery.
The following resolution was adopted:
Resolved, That the tolls to be collected by the Manistee River Improvement Company be the same for the year 1878 as established by this board for the year 1877.

RALPH ELY, *Secretary.*

The plaintiff's counsel, further to maintain and prove the issue on its part, offered in evidence the action of the board of control fixing the rates of tolls for the year 1880, under date of March 31st, 1880; also the action of the board of control fixing the rates of toll for the year 1881, under date of April 14th, 1881; to the introduction of each of which records in evidence the counsel for the defendant then and there objected upon the ground that they were irrelevant and immaterial, and that they were wholly insufficient to authorize the plaintiff to collect any tolls as claimed.

Said objection was then and there overruled by the said court; to which ruling and decision the said defendant, by his counsel, then and there duly excepted; and thereupon the said certified copies of records were read in evidence, and read as follows:

EXHIBIT "M."

13 At a meeting of the board of control of the St. Mary's Falls ship canal, held in the city of Lansing, in the office of the auditor general, on Wednesday, March 31st, 1880.

Present: Hon. Benj. D. Pritchard, State treas.; Hon. W. Irving Latimer, aud. gen.

On motion, the rates of tolls were fixed for the year 1880 upon all logs put into the Manitee river, as follows:

Ranges 4, 5, 6, and 7, fifteen cents per M ft., board measure.
Range 8, 13 cents per M feet, board measurr.
Range 9, 10 " " " "
Range 10, 8 " " " "
" 11 & 12, 7 cts. " " "

Board of control of St. Mary's Fall's ship canal met at the office of the auditor general on Thursday, April 14th, 1881, at 10 o'clock a. m., as per adjournment from April 7th, 1881.

Present: Hon. David H. Jerome, Governor; Hon. Benj. D. Pritchard, State treas.; Hon. W. Irving Latimer, aud. gen.

Business before the board was the fixing of the tolls of the Manistee River Improvement Company, B. M. Cutcheon and T. J. Ramsdell appearing before the board for the company, and M. J. Smiley appearing on behalf of the lumbermen.

After discussing for some time this matter the board took a recess until 3 o'clock p. m.

Board came to order at 3 o'clock p. m.; full board present.

After due consideration the board passed the following resolution:

Resolved, That the rates of toll be fixed for the ensuing year upon all logs run through the improvement of the Manistee river, as follows:

	Ranges 4, 5, & 6,	9 cents per M ft., board measure.
14	Ranges 7, 8, & 9,	6 " " " "
	10, 11, & 12,	5 " " " "

The plaintiff, further to maintain and prove the issue on its part, offered in evidence a certified transcript of the proceedings and judgment in the case of The Attorney General on the relation of Benjamin *vs.* The Manistee River Improvement Company, including the petition, plea, demurrers, joinder in demurrer, and judgment of the court, the date of said judgment being February 11th, 1880.

To the introduction of which in evidence the said defendant, by his counsel, then and there objected upon the ground that it was irrelevant and immaterial.

Thereupon the said court overruled the said objection, and the defendant, by his counsel, then and there duly excepted to the said ruling and decision.

The record was read in evidence and read as follows:

STATE OF MICHIGAN, } ss:
Kent County, }

Supreme Court.

Otto Kirchner, attorney general of the State of Michigan, who sues for the people of said State of Michigan in this behalf, comes here in the supreme court of said State, on the second day of May, A. D. 1879, and for the said people of the State of Michigan at the relation of David M. Benjamin, of the county of Kent, in said State, according to the form of the statute in such case made and provided, gives the said court here to understand and be informed that the Manistee River Improvement Company, to wit, at Manistee, in the county of Manistee, in said State, for the space of five years now last past and upwards, have used and now do use, without any warranty, grant, or charter, the following liberties, privileges, and
15 franchises, to wit: That of being a body politic, in law, fact, and name, by the name of the Manistee River Improvement Company, by the same name to plead and be impleaded, to answer and be answered unto; and also the following liberties, privileges, and franchises, to wit: That of making certain improvements in the Manistee river, a navigable river in said State, running into and through the counties of Otsego, Crawford, Kalkaska, Missaukee, Wexford, and Manistee, in said State, and emptying into Lake Michigan, in the county of Manistee, *in the county of Manistee* in said State, and of levying, collecting, and receiving tolls from all persons using said river in running, rafting, or floating logs and timber down said river in the counties of Kalkaska, Missaukee, and Wex-

ford, and of levying and collecting and receiving tolls for the passage of timber, logs, and lumber through said river, in said counties of Kalkaska, Missaukee, and Wexford.

All which liberties, privileges, and franchises the said Manistee River Improvement Company, during all the time aforesaid, have usurped and still do usurp upon the said people, to their great damage and prejudice.

Thereupon the said attorney general prays the advice of the said court in the said premises and due process of law against the said Manistee River Improvement Company in this behalf to be made answer to the said people by what warrant they claim to have, use, and enjoy the liberties, privileges, and franchises aforesaid.

OTTO KIRCHNER,
Attorney General, Michigan.

STATE OF MICHIGAN:

The Supreme Court.

THE ATTORNEY GENERAL upon the Relation of DAVID M. BENJAMIN

vs.

THE MANISTEE RIVER IMPROVEMENT COMPANY.

16 And the said respondent, by Benton Hanchett and G. M. Stark, its attorneys, comes, and, having heard the said information read for a plea in that behalf, says:

This respondent, the Manistee River Improvement Company, is a corporation organized under and in pursuance of an act of the Legislature of this State entitled "An act to authorize the formation of corporations for the purpose of improving the navigation of rivers," approved April 5th, 1869, and was organized by the following proceedings, viz: On, to wit, the sixteenth day of March, A. D. 1870, the following persons, viz: Geo. W. Robinson, Wm. Wheeler, Robert M. Risdon, D. D. Ruggles, Neil Leitch, Horace Butters, Byron M. Cutcheon, and Geo. W. Bullis, did associate for the purpose of improving the navigation of the Manistee river, in this State, which is a navigable river, by deepening the channel thereof (and constructing dams therein) under the provisions and upon the terms and conditions prescribed by the said act of the Legislature of this State, and did then, under their hands and seals, make a certificate which specified as follows, in the following terms, viz:

1st. The name of this corporation shall be and is The Manistee River Improvement Company.

2nd. The stream and section of the stream to be improved is the Manistee river and its tributaries, especially those connecting with Fife and Portage lakes, from the east line of Manistee county to the head waters of said Manistee river.

3d. The amount of the capital stock of this company shall be, and is, one hundred thousand dollars, which capital stock is divided into one thousand shares of one hundred dollars each.

17 4th. The names and residences of the stockholders, and the number of shares held by each of them, are as follows, to wit:

Names.	Residences.	No. of shares.
Geo. W. Robinson	Manistee	One hundred.
Wm. Wheeler	"	Fifty.
Robert M. Risdon	"	One hundred.
Daniel D. Ruggles	"	Fifty.
Neil Leitch	Filer	Fifty.
Horace Butters	Stronach	Fifty.
Byron M. Cutcheon	Manistee	Ten.
Geo. W. Bullis	"	Ten.

5th. The names of the first directors are as follows, to wit: Geo. W. Robinson, Wm. Wheeler, Robert M. Risdon, Horace Butters, Byron M. Cutcheon.

6th. The office of said company, where their business is transacted, is located in the city of Manistee, in the county of Manistee, State of Michigan.

7th. The term of existence of this company shall be thirty years.

The said certificate was duly signed, executed, and sealed by each of the said persons, Geo. W. Robinson, Wm. Wheeler, Robert M. Risdon, D. D. Ruggles, Neil Leitch, Horace Butters, Byron M. Cutcheon, and Geo. W. Bullis, and was afterwards and on said 16th day of March, 1870, at said county of Manistee, duly acknowledged by each of said persons as deeds are required to be acknowledged by the laws of this State.

Afterwards and on the 16th day of March, A. D. 1870, the said certificate was recorded in the office of the clerk of said county of Manistee, in which county the office of said company, viz., the said Manistee River Improvement Company, was then located; and afterwards and on the 4th day of April, 1870, a copy of said certificate was filed in the office of the secretary of state.

18 And the said persons above named did in all things comply with the provisions of section two of the aforesaid act, and, by means of the premises, on the said 4th day of April, 1870, the said respondent became a body corporate for the term of thirty years then next ensuing, by the said name of the Manistee River Improvement Company, and then became possessed, as such corporation, of all the powers, privileges, rights, and franchises conferred upon corporations under said act.

And this respondent has ever since continued to be such corporation, and to possess the rights, powers, privileges, and franchises aforesaid, and has ever since been recognized by this State as such corporation.

After the organization of this respondent as aforesaid this respondent prepared a map of the section of the Manistee river, the navigation of which this respondent proposed to improve, and a plan of the improvement of the same, which did show and set forth the several points in said stream where improvements were proposed to be made by this respondent and the nature and character of such improvement. And this respondent presented the same to Henry

P. Baldwin and Dwight May, the Governor and attorney general of this State, and such improvement was in writing assented to by them.

And afterwards and on the 6th day of July, 1870, this respondent submitted said map and plan to the board of control of the St. Mary's Falls ship canal, at a meeting of said board then held; and thereupon at said meeting and on the 6th day of July, 1870, the said board of control examined said map and plan and were then and there of opinion that the construction of the said proposed improvement would be a public benefit, and that this respondent was a
19 proper company to make such improvements, and did approve of said map and plan and did assent to the construction of the said proposed improvements and endorsed upon such map and plan their approval thereof and their assent to the said proposed improvements, and then and there fixed the time within which the said improvements should be completed to be on or before December 31st, 1874.

The said proposed improvements consisted in deepening the channel of the said Manistee river by removing the *in*structions from the river by cutting channels through twenty-two several places in said river, designated as jams and numbered consecutively on said plan from one to twenty-two, both inclusive, by confining the waters of the river within the channel at the points designated on said plan, and in constructing two dams upon said river, one upon section eighteen and the other upon section nineteen, in township 28 north, range four west.

Said proposed improvements extended upon said river from the east line of the county of Manistee to the above-mentioned location of said dam upon section eighteen and is located in the counties of Missaukee, Wexford, Kalkaska, and Crawford.

Afterwards said board of control, on good cause shown therefor, from time to time extended the time for the completion of said improvement to the 31st day of December, 1882, the first extension of such time being made on the 16th day of September, 1873.

The said board of control also after the said approval of said plan, upon petition of the said respondent, consented to the alteration of said plan in this, that in the place and stead of the construc-
20 tion of said two dams on sections eighteen and nineteen in said township 28 north, range four west, there should be constructed one dam upon said river, to be located near the north line of section 29, in township 27 north, range four west.

This respondent, after the approval of this plan by the said board of control, and the assent of said board to the construction of said improvement, made and given as above stated, proceeded to make and construct such improvement in pursuance of the authority granted to it therefor by said board of control, and by said assent of the Governor and attorney general of said State, carrying on the work of making such improvement in the years 1870, 1871, 1872, 1873, 1874, 1875, 1876, and during the said time fully completed all of said improvements, except the construction of the said last mentioned dam.

That in such improvement this respondent has expended a large

sum of money, viz., fifty thousand dollars, and has greatly improved the navigation of said stream throughout the entire extent of said river from the east county line of the county of Manistee to and including the upper limit specified in said plan for the improvement of said river, so that the said river is now in good condition for the floating of logs and timber throughout said portion thereof, and logs are floatables benefited by such improvement.

That the work of the making of said improvement was begun at the part lowest down upon the river, and was carried on by advancing up the stream, and was completed as it went forward. In this manner a portion of said work was completed by this respondent in the year 1871, and such portion was completed to the satisfaction of said board, and was, in the opinion of said board of con-
21 trol, useful, and the said board of control were of the opinion tolls should be paid for the use of such portion; and thereupon, on the 26th day of February, 1872, the said board of control fixed and determined the tolls to be paid for the use of such portion upon the logs which should be put into and run upon such portion of said stream.

Other portions of said work were also completed in like manner subsequently, and from year to year, until the entire of said improvements except the construction of said dam had been completed, and the portion of said work so completed from time to time was completed to the satifaction of the said board of control, and was, in the opinion of said board, useful, and in their opinion tolls should be paid for the use thereof, and tolls were from year to year and in each of the years from 1872 to 1878 fixed by said board of control for the said years for the portion of said years' work completed to such times, respectively, upon the logs put into and run upon such portions, and such tolls have been accordingly and in pursuance of such action of said board of control collected by this respondent.

And this respondent says that the entire of said proposed improvements, as shown upon its said plan, has been fully completed and to the satisfaction of said board, except the construction of said dam. And the said improvement so completed was, on the 26th day of February, 1879, adjudged and determined by said board to be completed, and the same was by said board accepted, and the said board also then determined that, in the opinion of said board, such improve-
ment is useful, and that tolls should be paid for the use
22 thereof, and afterwards and on the 11th day of April, 1879, the said board of control did fix the rates of tolls which should be paid for the use of such improvements for the ensuing year upon logs put into and run upon the portion of said river which was improved as aforesaid, and this respondent has the right by virtue of the premises to collect such tolls.

This respondent says that it is such body politic and corporation as is above set forth, and that it possesses the liberties, privileges, and franchises in this plea stated; and this the respondent is ready to verify.

BENTON HANCHETT,
G. M. STARK,
Attorneys for Respond't.

STATE OF MICHIGAN:

Supreme Court.

THE ATTORNEY GENERAL upon the Relation of DAVID M. BENJAMIN

vs.

THE MANISTEE RIVER IMPROVEMENT COMPANY.

And the said attorney general, as aforesaid, as to the said plea of the said respondent by it pleaded, saith that the same, and the matters therein contained, in the manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said attorney general, from having or maintaining his aforesaid information against the said respondent, and that he, the said attorney general, is not bound by law to answer the same; and this he, the attorney general is ready to verify.

23 Wherefore, by reason of the insufficiency of the said plea in this behalf, the said attorney general prays judgment against the said respondent.

OTTO KIRCHNER,
Att'y Gen'l, Mich.

STATE OF MICHIGAN:

The Supreme Court.

THE ATTORNEY GENERAL upon the Relation of DAVID M. BENJAMIN

vs.

THE MANISTEE RIVER IMPROVEMENT COMPANY.

And the said respondent says that the said plea of the said respondent and the matters therein contained are sufficient in law to bar and preclude the said attorney general from having or maintaining his aforesaid information against the said respondent, and the said respondent is ready to verify and prove the same, when and where, and in such manner as the said court shall direct.

Wherefore, inasmuch as the said attorney general has not answered said plea nor denied the same, the said respondent prays judgment, and that the said attorney general may be barred from having or maintaining his aforesaid information against the said respondent.

BENTON HANCHETT,
G. M. STARK,
Attorneys for Respondent.

DAVID M. BENJAMIN, Relator,

vs.

THE MANISTEE RIVER IMPROVEMENT COMPANY.

24 The cause having been heretofore brought to a hearing on the demurrer to the plea filed therein, and having been argued by counsel and duly considered by the court, and it appearing to the court that the said demurrer is not well taken, it is now

by the court ordered and adjudged that the said plea of the respondent is sufficient in law and an answer to the information filed therein, and that defendant is not guilty of unlawful usurpation charged against it, and that it have judgment accordingly; and it is further ordered that the said defendant do recover of the said relator its costs of this suit, to be taxed, and that the defendant have execution therefor, and that they go hence without day as to the said charges in said information charged.

The plaintiff, further to maintain and prove the issue on its part, offered in evidence a resolution of the board of directors of the Manistee River Improvement Company, bearing date June 12th, 1880, which read as follows:

"Resolved, That the attorneys of the company are instructed to bring suit against any parties who refuse to pay their tolls in such courts of competent jurisdiction as shall be most convenient, with authority to employ local counsel, when necessary, in the prosecution of such suits."

And thereupon the said plaintiff, further to maintain and prove the issue on its part, introduced as a witness Nelson G. Robinson, who, being duly sworn, gave evidence tending to prove that during the years 1878, 1879, 1880, and 1881, respectively, logs owned by the defendant were run and floated through the Manistee river, and passed over and through that part of the river which had been improved by the plaintiff.

25 That during the years 1878, 1879, 1880, and 1881, respectively, logs owned by the defendant were run and floated through the Manistee river, and passed over and through that part of the river which had been improved by the plaintiff.

That for the logs that passed through and over the said improvements in the year 1878 the tolls at the rates fixed by the board of control for that year would amount to the sum, as stated by the witness, of one thousand five hundred and eight dollars and thirty-nine cents, on which defendant had paid eight hundred dollars, and was allowed the further sum of three hundred and forty-seven dollars and forty-one cents for labor performed on the improvements by defendant for the plaintiff, leaving a balance unpaid of three hundred sixty dollars and ninety-eight cents.

That for the logs that passed through and over said improvements in the year 1879 the tolls at the rates fixed by the board of control for that year would amount to the sum, as stated by the witness, of one thousand six hundred and forty-two dollars and fifty-six cents.

26 That for the logs that passed through and over said improvements in the year 1880 the tolls at the rates fixed by the board of control for that year would amount to the sum, as stated by the witness, of three thousand four hundred forty-seven dollars and forty-eight cents.

That for the logs that passed through and over the said improvement in the year 1881 the tolls at the rates fixed by the board of control for that year would amount to the sum, as stated by the witness, of two thousand six hundred fifty-four dollars and eighty-

two cents, making a total sum unpaid, including interest, of nine thousand seven hundred two dollars and nine cents.

27 And thereupon the said plaintiff rested its case.

And thereupon the defendant, to maintain and prove the issue on his part, gave evidence tending to prove that the amount of logs belonging to him which passed through said improvements during the said years 1878, 1879, 1880, and 1881 was ten per cent. less than that claimed by the said plaintiff.

And thereupon the defendant rested his case.

And thereupon, the testimony in said cause being closed, the counsel for the said defendant then and there in his behalf requested the court to charge the jury as follows:

28 First. That the statute of the State of Michigan purporting to give to the board of control authority to fix the rates of tolls which should be paid for the use of the alleged improvements of the plaintiff is illegal and void and opposed and contrary to the fourteenth amendment of the Constitution of the United States, which, among other things, provides that no State shall deprive any person of his life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

But the said court then and there declined and refused to instruct the jury as thus requested.

To which refusal so to charge as requested the said counsel for the defendant then and there duly excepted.

And the counsel for the said defendant then and there in his behalf further requested the said court to charge the jury:

That said statute purporting to give the said board of control authority to fix the rates of tolls for the alleged improvements of the plaintiff provides for no notice to parties interested in the fixing of said tolls; provides for no means by which log owners shall be notified or may be heard on the subject of fixing said tolls; provides no means by which the action of said board of control may be reviewed, and is void, as opposed to the said fourteenth amendment of the Constitution of the United States, providing that no person shall be deprived by any State of his life, liberty, or property without due process of law.

But the said court then and there declined and refused to instruct the jury as thus requested.

29 To which decision and refusal of the said court to so charge the jury the counsel for the said defendant, in his behalf, then and there duly excepted.

And the said counsel for the said defendant then and there further requested the court, in his behalf, to charge the jury as follows:

That said statute of Michigan purporting to give said board of control arbitrary and unlimited power to levy tolls upon the logs passing through said improved portions of the said Manistee river provides no means by which the parties owning such logs may contest either the fixing of said tolls, in the first instance, or the validity or propriety of the rates fixed afterwards, and in effect attempts to deprive persons of their propery without due process of law, and is in con-

flict with and contrary to the said fourteenth amendment of the Constitution of the United States.

But the said court then and there refused to so charge the jury as requested.

To which refusal so to charge, as last requested, the defendant, by his counsel, then and there duly excepted.

And the said defendant, by his counsel, then and there further requested the court to charge the jury:

That for the same reasons stated in the foregoing requests to charge, viz., the said three foregoing requests to charge, said statute is also opposed to the fifth amendment of the Constitution of the United States, and is void.

But the said court then and there refused to so instruct the jury as requested.

To which refusal to charge as requested the counsel for the said defendant, and in his behalf, then and there duly excepted.

30 And the counsel for the said defendant then and there further requested the court to charge the jury as follows:

That the said law authorizing the improvements of rivers and the collection of tolls for such improvements is also void, as opposed to section ten, article one, of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of a contract. That said law seeks to impair the obligations of the contract or ordinances of 1787, so called, which gave to the people of the northwest territory the right to the use of the navigable waters leading into the St. Lawrence, &c., without any tax, import, or duty therefor.

But said court then and there refused to so charge the jury.

To which refusal to charge as requested the counsel for the said defendant, in his behalf, then and there duly excepted.

And the counsel for the said defendant then and there further requested the said court to charge the jury, in substance:

That upon the whole record and the evidence as introduced in the case the said plaintiff was not entitled to recover, and that the defendant was entitled to the verdict of the jury in his favor.

But the court then and there refused to so charge the jury as requested.

To which refusal and decision of the said court to charge as requested the defendant, by his counsel, then and there duly excepted.

And thereupon the said court proceeded to charge the jury, upon his own motion, as follows:

31 *Charge.*

GENTLEMEN OF THE JURY: This case is commenced by the Manistee River Improvement Company against Louis Sands to recover a certain amount for tolls for handling certain logs belonging to this defendant by the plaintiff on the Manistee river.

It is proved here, beyond any controversy, that in the year 1870 the plaintiff organized itself into what is now the Manistee River Improvement Company, under the general laws of the State, for

the purpose of improving the stream, widening the channel, deepening it, and making it in such condition as to facilitate the transfer of logs, &c., down the stream.

It is also proved, beyond any question, in this case, that after the organization of this company a plan of the proposed improvements was made out and was afterwards approved of by the board of control, consisting of the Governor, State treasurer, and auditor general.

It is also proven here conclusively that after this, and in pursuance of the articles of association, this company made the improvements in accordance with the plans and specifications, and that for different years, and from that date until now, or until 1881 at least, and including that year, the board of control fixed the tolls which this company might lawfully charge the owners of the timber on this stream for taking the logs down.

There is no dispute about these things as a matter of fact.

32 I charge you, as a matter of law, that it is competent for the Legislature of this State to make the law under which this improvement company has acted.

It was also competent for the board of control, under the law, to fix the tolls for these particular years, and under this law this plaintiff is entitled to recover at your hands the actual amount due it for transporting the defendant's logs down the stream.

Mr. WHEELER (interrupting): They do not transport them, your Honor, they simply allow them to go down the stream.

The COURT: Well, taking them down the stream for 1878, 1879, 1880, and 1881.

The plaintiff seeks to recover in this action for the year 1878 a balance, $360.98; for the year 1879, $1,642.56, and for the year 1880, $3,447.48, and for the year 1881, $2,654.82, making the sum total of $8,105.84 principal, to which the interest is added from November of each of these years on the amount due for each year, making the total sum, according to the plaintiff's claim, of $9,702.09.

There is some dispute and, in fact, I might say here the only question for you to decide is as to the exact amount the plaintiff should recover in this action.

It is claimed by the defendant that this claim of $9,702.09 is excessive, and that the true amount is $8,731.88.

This is for you to decide from the evidence in the case. You have heard both theories, and it is for you to say in this case what is right under the evidence.

The law gives the plaintiff the right to recover so much per thousand, board measure, as fixed by the board of control.

It is for you to say, then, which one of these theories is true—whether, as a matter of fact, they are entitled to the amount

33 claimed by the plaintiff or the amount — by the defendant.

If you think, under all the circumstances, that $9,702.09 is the amount they are entitled to, then you should render a verdict accordingly; if not, it should be $8,731.88, or whatever amount less than the plaintiff's claim which you may find under the evidence.

Now, look the matter all over in a business-like manner, and decide it.

Thereupon the said counsel for the defendant duly excepted to that part of the charge of the court, given upon his own motion, to the effect that said statute of the Legislature of the State of Michigan authorizing the collections of tolls upon the Manistee river was sufficient in law to authorize the collection of such tolls.

Also to the charge of said court, upon its own motion, in substance that the action of the board of control offered in evidence was sufficient to lawfully authorize the collection of tolls by the plaintiff.

And the said defendant, by his counsel, particularly excepted to the charge of the said court which was in the following language:

"I charge you, as a matter of law, that it is competent for the Legislature of this State to make the law under which this improvement company has acted."

And also to the charge of said court, upon his own motion, which was in the following language:

"It was competent for the board of control, under the law, to fix the tolls for these particular years, and under this law this
34 plaintiff is entitled to recover at your hands the actual amount due it for transporting defendant's logs down the stream—taking them down the stream—for 1879, 1880, and 1881."

Upon the evidence aforesaid, which is the substance of all the evidence in the case, the said court, under the instructions given to the said jury as aforesaid, left and submitted the said issue to the said jury, which said jury then and there rendered a verdict in favor of the plaintiff for the sum of $8,731.88.

And inasmuch as the exceptions aforesaid taken upon the said trial, and to the charge and refusal to charge of the said court, do not otherwise appear upon the records of said court in said cause, the said circuit judge has, at the request of the said defendant's counsel, settled and signed this bill of exceptions this 15th day of September, A. D. eighteen hundred and eighty-three.

BYRON JUDKINS,
Circuit Judge.

35 *Declaration.*

STATE OF MICHIGAN,
County of Manistee, } *ss:*

In the Circuit Court for the County of Manistee.

The Manistee River Improvement Company, plaintiff herein, by Ramsdell and Benedict and B. M. Cutcheon, its attorneys, complains of Louis Sands, defendant herein, in a plea of assumpsit, filing this declaration as commencement of suit; for that the said plaintiff is a corporation organized under an act of the Legislature of the State of Michigan entitled "An act to authorize the formation of corporations for the purpose of improving the navigation of rivers," approved April 16th, 1869, and such corporation is now existing and doing business under and by virtue of the laws of this State as such corpo-

ration. Such corporation was formed and organized in the year 1870, and was organized for the purpose of improving the navigation of the Manistee river, in this State, which is a navigable river, by deepening the channel thereof and the construction of dams therein, under the provisions and upon the terms and conditions prescribed by the said act of the Legislature. Such corporation was organized on the fourth day of April, 1870. After the organization of such corporation it prepared a map of the section of the Manistee river, the navigation of which such corporation proposed to improve, and a plan for the improvement of the same, which did show and set forth the several points in said stream where the
36 improvements were proposed to be made by the said corporation and the nature and character of said improvements, and presented the same to the Governor and attorney general of this State; and said improvement was in writing thereupon assented to by said Governor and attorney general; and afterwards on to wit, the sixth day of July, 1870, said corporation submitted the said map and plan to the board of control of the St. Mary's Falls ship canal, at a meeting of said board then held, and thereupon, at said meeting, said board of control examined said map and plan, and were then and there of the opinion that the construction of the said proposed improvement would be a public benefit, and that said corporation was a proper company to make such improvement, and did approve of said map and plan, and did assent to the construction of said proposed improvement, and endorsed upon said map and plan their approval thereof and their assent to the proposed improvement. The said proposed improvement consisted in deepening the channel of said Manistee river by removing obstructions from the river, cutting channels through twenty-two several places in said river designated as jams, and numbered consecutively on said plan from one to twenty-two, both inclusive, confining the waters of the river within the channel at the points designated on said plan, and in constructing two dams upon said river, one upon section eighteen and the other upon section nineteen, in township 28 north, of range four west. Such proposed improvement extended upon said river from the east line of the county of Manistee to the above-mentioned location of said dam upon said section eighteen. Said corporation, after the approval of said plan by said board of control and the assent of said board to the construction of said proposed improvement, as aforesaid proposed, proceeded to make
37 and construct, and did make and construct, such improvement, and fully completed all of said improvement prior to the year 1877, except the construction of said dam to be located on said section eighteen. The time for the construction of said dam and for the full completion of said proposed improvement has not yet expired as fixed and extended by said board of control.

The portion of said improvement completed as aforesaid extended from the east line of said Manistee county, upon said river, to the north line of section eighteen, town. twenty-eight north, of range four west, and said improvement was completed, as aforesaid, to the satisfaction of said board of control, and it was so far useful that, in

the opinion of said board of control, tolls should be paid for the use thereof, and the said board so determined, and the said board did so fix and determine that the tolls to be paid for the use of said portion of said improvement for the year 1878 — to be as follows, to wit: That upon all logs put into said river in townships situated in ranges five, six, and seven west, fifteen cents per thousand feet; in range eight, thirteen cents per thousand feet; in range nine, ten cents per thousand feet; in range ten, eight cents per thousand feet; in ranges eleven and twelve, seven cents per thousand feet, board measure, should be paid, and said rates of toll were continued by said board without change during the years 1879 and 1880.

And the said board further fixed the tolls for logs run through said improvement and put in from range four and above at fifteen cents per thousand feet, board measure, for the years 1879 and 1880.

38 And the board further fixed the tolls for logs run through said improvements in the year 1881 as follows, to wit: On all logs put into said river in township situated in ranges four, five, and six, nine cents per thousand feet; in range- seven, eight, and nine, six cents per thousand feet; in ranges ten, eleven, and twelve, five cents per thousand feet, board measure; and plaintiff further avers that after said improvement had been made as aforesaid, and after said tolls had been fixed by said board for the years 1877, 1878, and 1879, and on the 11th day of February, A. D. 1880, in a suit brought in behalf of the people of the State of Michigan against the said plaintiff in the supreme court of said State, by the consideration and judgment of said court delivered in the January term thereof, A. D. 1880, it was adjudged and determined that the said plaintiff was such corporation aforesaid; that it had made said improvements; that said improvements were completed to the satisfaction of said board, and were accepted by said board; that said board had determined that, in their opinion, such improvements were useful, and that tolls should be paid for the use thereof, and that said tolls were duly fixed by said board for said

39 years, and that said plaintiff was entitled to collect said tolls and such tolls as were or should be fixed by said board for the use of the portion of said river improved as aforesaid in the running of logs through the same; and the plaintiff avers that it had and now has such right and is entitled to collect such tolls; and plaintiff further avers that the said defendant put into the Manistee river and caused the same to be floated and run down said river through and upon the portion thereof improved as aforesaid in the years 1878, 1879, 1880, and 1881, large quantities of logs, to wit, 78,711,041 feet, board measure, and in running said logs during each of said years the said defendant used and had the benefit of said improvement, and thereupon the said defendant became and was liable to pay the said plaintiff the rates of toll aforesaid, amounting to the sum of $9,253.25; a more particular statement of which is set forth in Exhibit "A," attached hereto as a part of this declaration. And thereupon the said defendant became and was liable to pay to the plaintiff the sum of $9,253.25 less the sum of $347.41, which,

by special agreement between the said plaintiff and the said defendant, was to be deducted from the aforesaid claim of
40 tolls, twenty-five per cent. thereof from the aforesaid tolls of 1879, and twenty-five per cent. thereof on the aforesaid tolls of 1880, and twenty-five per cent. thereof to be deducted from the aforesaid tolls of 1881, the same to be in full for labor performed by the defendant for the plaintiff in driving out flood-wood prior to December 10, 1878, the said defendant agreeing to pay said tolls less said deduction, and being so liable to pay the same to said plaintiff. In consideration thereof the defendant afterwards undertook and promised to pay the same to said plaintiff, and paid thereon the sum of $800.00, and although often requested so to do hath not paid the said plaintiff the remaining sum of $8,105.84 so as aforesaid due, nor any part thereof, nor interest thereon, to plaintiff's damage — $12,000.00; also for that the said plaintiff is a corporation organized, existing, and doing business under the laws of the State of Michigan, that was organized, under and in pursuance of said act of the Legislature in the foregoing court mentioned, for the purpose of improving the navigation of the Manistee river, which is a navigable river in this State, by deepening the channel
41 thereof and the construction of dams thereon, and to take and receive such amounts of tolls for the passage of vessels, boats, rafts, timber, logs, and lumber through such river when the navigation should be thus improved as the board of control of the St. Mary's Falls ship canal might prescribe. Such plaintiff was organized as such corporation in the — 1870, and after such organization the plaintiff prepared a map of the section of the said Manistee river, the navigation of which the plaintiff proposed to improve, and the plan for the improvement of the same, which did show and set forth the several points in such stream where improvements were proposed to be made, the nature and character of such improvements, and submitted the same to said board of control, at a meeting thereof, and the said board examined the same, and the said board were of the opinion that the construction of such improvements would be a public benefit, and that the plaintiff was a proper company to make the same, and thereupon they endorsed upon such map and plan their approval thereof and their consent to the construction of the improvements proposed, and the said plaintiff also obtained the assent in writing of the Governor
42 and attorney general of said State to improve the navigation of said river under the said act. The said improvement extended and was upon the portion of said river extending from the east line of Manistee county, to wit, the north line of section 18, town 28 north, of range four west, and consisted in deepening the channel of said river and constructing dams therein.

Said plaintiff proceeded to make the improvement set forth in said plan after the same was approved as aforesaid and as the same was from time — altered by the consent of the board of control upon the petition of the plaintiff in the year (to wit) 1877. A portion of said work, to wit, said improvement, extending from the east line of said county of Manistee to the north line of section eighteen,

township twenty-eight north, of range four west, was completed to the satisfaction of the said board of control, and it was so far useful, in the opinion of said board, that tolls should be paid for the use thereof; and thereupon said board, from time to time, fixed the tolls to be paid for the use of said portion of said work for the years 1877, 1878, 1879, and 1880 as follows, to wit: That upon all logs put
43 in townships situated above or in ranges 4, 5, 6, and 7 west, fifteen cents per thousand feet; in range eight, thirteen cents per thousand feet; in range nine, ten cents per thousand feet; in range ten, eight cents per thousand feet; in range eleven and twelve, seven cents per thousand feet, board measure, should be paid.

The said board also fixed the tolls to be paid for the use of said improvements in the running of logs in the year 1881 and in the year 1882, up to the time of filing this declaration, at, to wit: For logs put in in townships situated above or in ranges from five and six, nine cents per thousand feet; in ranges seven, eight, and nine, six cents per thousand feet; in ranges ten, eleven, and twelve, five cents per thousand feet, board measure. The whole of the improvement proposed as aforesaid by said plans had not during said years been completed, and the time for the full completion thereof had not then expired, as the same had been extended by said board; and after such portion of said improvement as above stated had been completed to the satisfaction of said board, and after said tolls had been fixed as aforesaid, the said defendant put into the Manistee river for floatage and running down through said improvements, and caused
44 to be floated and run down said river through and upon the portion thereof improved as aforesaid, large quantities of logs, to wit, 78,711,041 feet, board measure, in the years aforesaid, and in floating and running said logs during each of said years 1878, 1879, 1880, 1881, & 1882 defendant used and had the benefit of said improvement, and thereupon the said defendant became and was liable to pay to plaintiff the rates of toll aforesaid, to wit: For logs put in during said years and prior to April first, 1879, in range nine, 14,600,239 feet, at ten cents per thousand; for logs put in prior to November 20, 1880, at range eleven, 4,136,899 feet, at seven cents per thousand; for logs put in prior to November 20, 1880, at range four, five, and seven, 36,342,478 feet, at fifteen cents per thousand; for logs put in between April 3, 1880, and November 1, 1881, at range four, 21,196,983 feet, at nine cents per thousand; for logs put in between April 3, 1880, and November 1, 1881, at range seven, 2,454,442, feet, at six cents per thousand; by means whereof the said defendant became indebted and liable to said plaintiff for the amount of tolls upon said logs fixed as aforesaid, amounting to the sum of, to wit,
$9,253,25, and the tolls aforesaid and the amount of tolls afore-
45 said were and are strictly confined to that portion of said river improved as aforesaid, and to the class of floatables benefited by said improvement; and the plaintiff avers that the said logs were and are a class of floatables benefited by said improvement, and the said defendant being so liable and indebted to the plaintiff in consideration thereof promised to pay the same to the plaintiff

or request; but, although requested to do so, hath not paid the same nor any part thereof except the sum of $800.00, and a further allowance of $347.41, which by special agreement the plaintiff allowed to the defendant for labor in driving out driftwood, the same to be deducted from said tolls, and thereupon the directors of said plaintiff have directed the collection of such unpaid balance by this suit, and plaintiff claims damages to the amount of $12,000.00 by reason of the said default of the said defendant in his failure to pay to the plaintiff the tolls aforesaid upon said logs; and therefore plaintiff brings suit.

RAMSDELL & BENEDICT AND
B. M. CUTCHEON, *Pl'f's Att'y's.*

46 MANISTEE, MICH.

Louis Sands in Ac. with Manistee River Improvement Co.

To tolls on the following amounts of logs put into the Manistee river & floated through the company's improvements at the rate of tolls per M feet:

1878.				
Aug.	8.	Logs put in winter 1877–'78, up to April 1, '78:		
		F S M B, range 9, 2,695,718 ft., @ 10c.		269 57
Mar.	1.	Logs put in from Ap'l 1, '78, to Sept. 1, '78:		
		F S S 6, range 11, 1,328,825 ft., @ 7c.	93 02	
		L S S 8, " 9, 5,895,015 ft.		
		L S M B, " " 1,642.68 "		
		7,501,699 ft., @ 10	750 17	
		A W D W, ward logs, water scaled, season 1878 up to Nov. 1, '78:		
		Range 5, 2,637,506 ft., @ 15	395 63	
				1,238 82
1879.				
Dec.	23.	A W D W, logs sawed from Nov. 9, '78, to Nov. 26, '78:		
		Range 5, 20,451 ft., @ 15	3 07	
		17 V °₀°, logs put in from July 5, '78, to Sept. 1, '78:		
		Range 5, 1,356,174 ft., @ 15	203 42	
				206 49
		Logs put in winter 1878–'79 to April 1, '79:		
		L S S 4, range 4, 3,396,211 ft.		
		" S 12, " 5, 571,992		
		†‡ †‡ " 5, 761,978		
		Lower camp, " 7, 544,155		
		Upper camp, " " 1,170,406		
		6,444,742 @ 15	966 71	
		Addis camp, " 9, 3,299,885 ft.		
		L S M B, " " 192,667		
		" S 13, " " 910,270		
		4,402,822 ft., @ 10	440 28	
		L S S 5, " 11, 176,968 ft., @ 7	12 39	
				1,419 38
		A D D W, logs sawed 1879:		
		Range 5, 111,276 ft., @ 15		16 69

47

1880					
March 25.	Logs put in summer 1879 to Nov. 1, '79:				
	L S S 12, range 4,	8[illegible]97,833 ft.			
	" " " 5,	197,570			
	L S S □, " 5,	3[illegible]48,124			
	" "6, " 7,	[illegible]802,796			
		12[illegible]946,323 ft., @ 15		1,941 95	
	" "16, " 11,	[illegible]594,754 ft., @ 7		41 63	
					1,983 58
July 8.	Logs put in winter 1879-'80 to Ap'l 3, '80:				
	L S S 6, range 7, 1,4[illegible]7,983 ft.				
	" "12, " 4, 6,4[illegible]0,319				
	" "17, " " 1,8[illegible]1,040				
		9,7[illegible]7,342 ft., @ 15			1,463 90
	Carried forward				6,598 43
July 8.	To amount brought forward				6,598 43
1881.					
Jan'y 26.	Logs put in summer 1880 to Nov. 20, '80:				
	L S S 16, range 11, 2[illegible]036,352 ft., @ 7			142 54	
	" "7, " 7, 2[illegible]913,408 ft.				
	" "17, " 4, 135,176				
		3,048,584 ft., @ 15		457 28	
					599 82
June 10.	Logs put in from Ap'l 3, '80, to May 1, '81:				
	L S S 12, range 4, 1[illegible],746,520 ft.				
	" " " " [illegible],433,772				
		15,180,292 ft., @ 9		1,366 23	
	Logs put in from Nov. 20, '80, to May 1, '81:				
	L S S 6, range 7, 1,0[illegible]75,465 ft., @ 6			100 53	
					1,466 76
1882.					
April 1.	Logs put in from May 1, '81, to Nov. 1, '81:				
	L S S 12, range 4, [illegible]652,814				
	" " " " [illegible]363,877				
		[illegible],016,691 ft., @ 9		541 50	
	" "6, " 7,	778,977 ft., @ 6		46 74	
					588 24
					$9,253 25
1879.					
June 9.	By paid treasurer				800 00
					$8,453 25

48 *Narr.*

To the within-named defendant:

Take notice that, on filing a declaration in this cause (of which the within is a true copy) as commencement of suit, a rule was entered in the book of common rules, kept by the clerk of said court in his office in the city of Manistee, requiring you to appear and

plead to said declaration within twenty days after service on you of a copy thereof and notice of said rule, or judgment, etc.

Yours, etc., RAMSDELL & BENEDICT & B. M. CUTCHEON,
Plaintiff's Attorneys.

STATE OF MICHIGAN, } ss:
County of Manistee, }

I hereby certify and return that on the 5th day of June, 1882, I served the declaration, of which the within is a copy, on Louis Sands, the defendant named in said declaration, by delivering to said defendant, in said county of Manistee, a true copy thereof, and of the foregoing, and the notice relating thereto, together with a true copy of the notice to appear and plead endorsed thereon as hereon endorsed.

MAX BAUMANN,
Under Sheriff.

Fees, $1.10.

(Endorsed:) Filed June 5, A. D. 1882. A. O. Ward, clerk.

49 STATE OF MICHIGAN:

The Circuit Court for the County of Manistee.

THE MANISTEE RIVER IMPROVEMENT COMPANY
vs.
LOUIS SANDS, Defendant.

And now comes the said defendant, by Hughes, O'Brien & Smiley, his attorneys, and demands a trial of the matters set forth in the plaintiff's declaration.

HUGHES, O'BRIEN & SMILEY,
Defendant's Attorneys.

GENTLEMEN: Please to take notice that on the trial of this cause the above-named defendant will give in evidence under the general issue above pleaded, and insist in this defense, that if the said plaintiff has any claim against this defendant, or has any right to collect tolls for the improvement of the Manistee river, that the said claim and the said right to collect tolls must arise from improvements which the said plaintiff has made on said Manistee river by having deepened the channels of said river, or by having constructed dams therein, or by having constructed canals to connect therewith, or by having diverted into said river waters from any lake or lakes in the vicinity thereof by canals which it has constructed for that purpose, or by having diverted the waters from the existing of said river by having cut across bends in said river, or by having flooded lands by the construction of the necessary dams, but that the said plaintiff has never made any improvement on said Manistee river, either by deepening the channels of said river
50 or by the construction of dams therein, nor by construction of canals to connect therewith, nor by diverting into said

river waters from any lake or lakes in the vicinity thereof by canals which it has constructed for that purpose, nor by diverting the water from the existing channel of said river by cutting across bends in said river, nor by having flooded lands by the construction of dams, nor has said plaintiff made any improvements for which it has the right to collect tolls.

And the defendant will further insist and show in his defense that the said plaintiff, for the purpose of causing the board of control to establish and fix the rates of toll on said river improvement at a high rate and higher than allowed by law in each of the years sued for, falsely and fraudulently represented and reported to said board of control that the amount of logs which would be run in said river through said improvements would be much less than said plaintiff knew and had good reason to believe it to be, to wit, less than one hundred millions, when said plaintiff well knew and had good reason to believe said sum would be more than one hundred millions feet of logs in each of said years, and by reason of said false and fraudulent representations induced and procured said board of control to fix said rates at a sum greater than the amount and rate allowed by law.

And said defendant will further insist and show in his defense that the said plaintiff, for the purpose of causing the said board of control to fix the rates of tolls for said river improvement at a rate and at a sum total greater than allowed by law, to wit, greater
51 than fifteen per cent. upon the total cost of said improvement, falsely and fraudulently caused it to be reported and represented to the board of control by said plaintiff's officers and servants that the costs of said improvements were much greater than they were in fact, and much greater than said plaintiff knew and had good reason to believe the costs of said improvements were; which said false and fraudulent statements and representations were made in each of said years for which said plaintiff sues for tolls, and by reason thereof and in consequence thereof the said board of control were induced to and did fix, or pretend to fix, said tolls so that the total thereof would amount to more than fifteen per cent. upon the total amount of said cost of said improvements in each of said years sued for.

And said defendant will further insist and show in his defense that the time allowed by the board of control to the said plaintiff to complete its said improvements long since elapsed and expired without the said improvements being completed and finished, as required by law, and without said time being extended by said board of control, and by means thereof said plaintiff forfeited its right to collect tolls for the use of said alleged improvements.

And the said defendant will further insist and prove in his defense that the said board of control, in attempting to fix the rates of toll upon the said alleged improvements, exceeded their power and jurisdiction in each of said years sued for, and fixed, or attempted to fix, said tolls at a much higher rate than they are and were allowed to do by law, and attempted to fix the same at a rate by which upon the said tolls could amount to more than fifteen per cent.

52 the cost of said improvement, and as the same appeared by, to, and *appeared* before said board of control, and as was shown before said board by the plaintiff, and exceeded their authority; whereby their said action became void and of no force.

Yours, &c.,

HUGHES, O'BRIEN & SMILEY,
Deft's Atty's.

Dated June 23, 1882.

To Messrs. Ramsdell & Benedict and B. M. Cutcheon, Esq.

(Endorsed:) Filed June 26, 1882. A. O. Ward, Clerk.

53 At a general term of the circuit court for the county of Manistee, continued and held at the court-house in the city of Manistee, in said county, on Wednesday, August 8th, A. D. 1883.

Present: Hon. J. Byron Judkins, circuit judge.

MANISTEE RIVER IMPROVEMENT CO. *vs.* LOUIS SANDS.

In this cause, the parties being in court, by their respective attorneys, ready for trial, thereupon came a jury, to wit, Patrick Miley, Andrew Simons, John Beck, P. B. Fisk, A. L. Overpack, M. C. Cross, Albert Baumann, A. J. Barty, Wm. S. Newson, E. D. Gardner, Joseph Saile, and N. Boulton, good and lawful men, who, being duly chosen, tried, and sworn well and truly to try the issue between the parties, after hearing the proofs and allegations of the parties, the arguments of counsel, and the charge of the court, retired from the bar without an officer, with consent of both parties, to con-

54 sider of their verdict to be given; and, after being absent for a time, return into court and say upon their oath that the said defendant did undertake and promise in manner and form as the said plaintiff hath in its declaration in this cause complained against *them*, and that they assess the damages of the said plaintiff, Manistee River Improvement Company, on occasion of the premises, over and above its costs and charges by its suit in this behalf expended, at the sum of eight thousand seven hundred and thirty-one dollars and eighty-eight cents.

Therefore it is considered that the said plaintiff do recover against the said defendant its damages aforesaid, together with its costs and charges aforesaid, to be taxed, and that the said plaintiff have execution therefor.

Read, signed, and approved in open court.

J. BYRON JUDKINS,
Circuit Judge.

55 At a general term of the circuit court for the county of Manistee, continued and held at the court-house in the city of Manistee, in said county, on Wednesday, August 8th, A. D. 1883.

Present: Hon. J. Byron Judkins, circuit judge.

MANISTEE RIVER IMPROVEMENT COMPANY *vs.* LOUIS SANDS.

In this cause, on motion of Mr. Smiley, attorney for said defendant, it is ordered that all proceedings, except the taxation of costs, be

stayed for sixty days to enable said defendant to settle and file a bill of exceptions herein.

Read, signed, and approved in open court.

J. BYRON JUDKINS,
Circuit Judge.

56 Know all men by these presents that Louis Sands, as principal, and William Wente and James Dempsey, as sureties, are held and firmly bound unto the Manistee River Improvement Company, a corporation formed and existing under and by virtue of the laws of the State of Michigan, in the penal sum of seventeen thousand five hundred dollars, lawful money; the payment of which sum, well and truly to be made, we bind ourselves and heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of December, A. D. 1883.

Whereas the above-bounden Louis Sands hath sued out of the supreme court of the State of Michigan a writ of error upon a judgment heretofore rendered in the circuit court for the county of Manistee in favor of said Manistee River Improvment Company and against said Louis Sands in the sum of $8,731.88 (*dollars*):

Now, therefore, the condition of the above obligation is such that if the above-bounden Louis Sands shall prosecute said writ of
57 error to effect in said supreme court and shall pay and satisfy such judgment as shall be rendered against him thereon, then this obligation to be void; otherwise of force.

LOUIS SANDS. [L. S.]
JAMES DEMPSEY. [L. S.]
WILLIAM WENTE. [L. S.]

STATE OF MICHIGAN, } ss:
Manistee County, }

I hereby approve of the within bonds, the amount of the penalty therein, and also the sureties.

Dated at Manistee this 15th day of December, A. D. 1883.

P. T. GLASSMIRE,
Circuit Court Commissioner.

STATE OF MICHIGAN, } ss:
County of Manistee, }

I, J. P. Baxter, clerk of the county of Manistee and the courts thereof, do hereby certify that I have compared the foregoing copy of declaration, plea, notice, verdict, & judgment, stay and bond in cause — Manistee R. I. Co. *vs.* Louis Sands with the original of record in my office, and that the same is a correct transcript therefrom and the whole of such original.

Witness my hand and the seal of the circuit court for the county of Manistee, at the city of Manistee, this eighteenth day of December, A. D. 1883.

J. P. BAXTER, *Clerk.*

58 *Writ of Error.*

The people of the State of Michigan to the judge of our circuit court in and for the county of Manistee, Greeting:

Because in the record and proceedings and also in the giving of judgment in a plaint which was in our said circuit court before you between the Manistee River Improvement Company, plaintiff, and Louis Sands, defendant, in a plea of assumpsit, manifest error hath intervened, to the great damage of the said defendant, as by his complaint we are informed, we, being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid and in this behalf, do command you that, if judgment be thereupon given, then you send to our supreme court, distinctly and openly, under your seal, the record and proceedings of the plaint aforesaid, with all things concerning the same, and this writ, so that our said court may have them at the supreme court room in the city of Lansing on the twentieth day of December next, that, the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error what of right and according to the law and custom of the State of Michigan ought to be done.

Witness the Honorable Benjamin F. Graves, chief justice of our supreme court, at Lansing, this 27th day of November, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] CHAS. C. HOPKINS,
Clerk of the Supreme Court.

[Endorsed:] No. 1210. Supreme court of the State of Michigan. Manistee River Improvement Co., pl'ff, *vs.* Louis Sands, app'l't, def't. Writ of error. Filed Dec. 20, 1884. Chas. C. Hopkins, clerk. M. J. Smiley, att'y for app'l't. H. H. Wheeler, of counsel.

59 *Assignment of Errors.*

STATE OF MICHIGAN:

Supreme Court.

THE MANISTEE RIVER IMPROVEMENT COMPANY, Plaintiff and Appellee,

vs.

LOUIS SANDS, Defendant and Appellant.

And now comes the said appellant, plaintiff in error in this cause, and says that in the record and proceedings in the said cause in the circuit court for the county of Manistee, now on file in this court, there is manifest error in the following particulars, to wit:

I.

The said circuit court erred in overruling the objection of said defendant's counsel to the articles of association of the said plaintiff and in receiving the same in evidence against said defendant's objection.

II.

The said court erred in overruling the said defendant's objection to the consent and approval of the board of control to the plan of the said plaintiff for the improvement of the Manistee river and in receiving the same in evidence against the said objection.

III.

The said court erred in receiving in evidence the record of the action of the said board of control and the assent of the Governor and attorney general against the objection of the said defendant's counsel.

60 IV.

The said court erred in receiving in evidence the record of the action of the said board of control taken February 26th, 1879, purporting to accept the alleged improvements of the plaintiff against the said defendant's objection.

V.

The said court erred in receiving in evidence the alleged record of the action of the said board of control under the date of March 28th, 1877, purporting to fix the rates of tolls on the Manistee river for the year 1877 against the said defendant's objection.

VI.

The said court erred in admitting in evidence the record of the alleged action of the said board of control of dates July 31st, 1878, April 11th, 1879, April 30th, 1879, and March 31st, 1880, purporting to fix said rates of tolls against the defendant's objection thereto.

VII.

The said court erred in admitting in evidence the record of the alleged action of the said board of control of date April 14th, 1881, purporting to fix the rates of tolls for the year 1881 upon said Manistee river against the defendant's objection thereto.

VIII.

The said court erred in admitting and receiving in evidence the record of the case of The Attorney General on the relation of Benjamin *vs.* the Manistee River Improvement Company against the defendant's objection thereto.

IX.

61 The said court erred in refusing to charge the jury as requested by the defendant in his first written request, to the effect that the statute of the State of Michigan, purporting to give to the board of control authority to fix the rates of tolls which should

be paid for the use of the alleged improvements of the plaintiff, is illegal and void, as contrary to the fourteenth amendment of the Constitution of the United States.

X.

The said court erred in refusing to charge the jury as requested by the defendant in his second request to charge, in substance, that the said statute is void, as contrary to the said amendment, because it provides no means by which log owners shall be notified or may be heard, and no means by which the said proceedings may be reviewed.

XI.

The said court erred in refusing to charge the jury as requested by the defendant's third written request to charge, in substance, that said statute attempts to give said board of control arbitrary and unlimited powers to levy tolls and take property without an opportunity of contesting said right on the part of the parties whose property is taken, and is void, as opposed to said amendment.

XII.

The said court erred in refusing to charge the jury as requested by the defendant's fourth written request to charge.

XIII.

The said court erred in refusing to charge the jury as requested by the defendant in his fifth written request to charge.

XIV.

62 The said court erred in refusing to charge the jury as requested by the defendant's counsel, that, upon the whole record and the evidence as introduced in the cause, the plaintiff was not entitled to recover, and that the defendant was entitled to the verdict in his favor.

XV.

The said court erred in charging the jury, upon his own motion, that it was competent for the board of control, under the law, to fix the tolls for the particular years in question, and that the plaintiff was entitled to recover such amount of tolls for transporting defendant's logs down the said river for the years 1878, 1879, 1880, and 1881.

And for the errors aforesaid the defendant, appellant, and plaintiff in error prays that the said record, judgment, and verdict may be reversed, annulled, set aside, and held for naught.

M. J. SMILEY,
Attorney for Plaintiff in Error.
H. H. WHEELER,
Of Counsel.

(Endorsed:) Filed Jan'y 4, 1884. Chas. C. Hopkins, clerk.

63 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the city of Lansing, on the twenty-fifth day of April, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Thomas M. Cooley, chief justice; James V. Campbell, Thomas R. Sherwood, John W. Champlin, associate justices.

THE MANISTEE RIVER IMPROVEMENT COMPANY, Plaintiff,
vs.
LOUIS SANDS, Defendant & Appellant.

This cause coming on to be heard is argued by B. Hanchett, for plaintiff, and submitted on defendant's brief.

64 *Opinion.*

STATE OF MICHIGAN:

In Supreme Court.

THE MANISTEE RIVER IMPROVEMENT COMPANY
vs.
LOUIS SANDS and Others.

SAME *vs.* DEMPSEY.

SAME *vs.* RUGGLES.

These cases all come up on the same question, whether the statute allowing the State board of control to regulate and the plaintiff to collect tolls for floating logs through such portions of the Manistee river as plaintiff has cleared and improved so as to facilitate floatage is valid.

There is a further question as to tolls previous to February, 1879. The defendants' brief gives no very tangible reason why these differ from the rest. We see nothing to authorize any inquiry behind the tolls claimed that has not been practically disposed of by our previous decisions. The validity of this legislation has been twice sustained by this court, first in the *quo warranto* brought by The State on the relation of Benjamin *v.* Manistee River Improvement Company, 42 Mich., 628, and afterwards in Manistee River Improvement Company *v.* Lamport, 49 Mich., 442. The decisions in those cases covered all the ground that seems to be covered by this case, but counsel have nevertheless seen fit to raise the same issues, as we suppose, for the purpose of review elsewhere, and therefore we are called upon to decide the controversy again, although it will not be necessary to repeat what has, in our judgment, been already sufficiently discussed. We shall content ourselves with a very
65 brief reference to what has been more fully referred to in those cases.

The two points on which defendant relies are: First, that levying these tolls is depriving defendant of his property without due process of law, and, second, that the power given over this stream violates the contract in the ordinance of 1787, which makes the

lakes and their affluents and connecting land portages free to all citizens of the various States as common highways, without taxes, imposts, or duties. As our own State constitution is quite as emphatic as the ordinance or United States Constitution on these heads, there is no occasion for doing more than making such an explanation as will show the substantial identity of the cases.

The statute in question was passed chiefly for the purpose of enabling streams which were insufficient for lumber floatage, by reason of natural difficulties or such other obstructions as had arisen, to be cleared and made available for getting logs to the mills on the lower parts of the same waters, or the rivers into which they empty. The statute requires the board of control from year to year to adjust the tolls by reference to the supposed amount of business likely to be done. The object of all this is to prevent any extortionate charges, and to make the tolls come as near a fair price for the use of the improvements as is feasible, a maximum rate being fixed, beyond which they cannot be charged at all. No tolls are alleged to be charged except for such parts of the river as are improved and by such floatable as derive benefit from it. Logs are not tolled for improvements which are not needed for log floatage, and these im-

66 provements may include dams to raise the streams and supplying feeders by connecting other waters.

It is difficult to give much force to the argument that deals with log-floatage in a stream that needs improvement to float logs at all, and which is entirely localized within the State as having much resemblance to navigation in its usual sense; but giving it all the force that is claimed for it, there can be no doubt that the object of the ordinance of 1787 was chiefly, if not entirely, to secure the same rights to non-residents as should be granted to residents, and to prevent any discriminating burdens. The Constitution of the United States has secured this equality of rights among the citizens of different States, and the constitution of Michigan has secured the common right of passage in all navigable waters. The controversy, therefore, is narrowed down to the inquiry whether the State has a right to provide for improving waters that need improvement and for allowing tolls to be charged for using improvements.

The idea that tolls for the actual use of passage over land or water highways can be treated as taxes and as invasions of private property does not appear to us tenable. They are not levied on property or on persons as their share of any public burden laid on the people, but they are a fixed compensation in lieu of a *quantum valebat* for the use of that which has value and which is actually used to advantage; and the statute contemplates that in all probability, without the facilities rendered by the improvement, much of the property floated would not get down the stream at all. They are collected on the same principle as turnpike tolls or railway and wharfage charges, which no one has ever supposed were public taxes or taxes at all. Turn-

pikes and canals are usually open to the use of everybody on

67 uniform terms, but they are seldom open to use without tolls.

In the grants made to this State of lands to build canals and improve streams tolls have been expressly provided for and author-

ized by Congress. 10 St. U. S., 35; 13 St. U. S., 519; Att'y Gen. *v.* Lake Superior Ship Canal Co., 32 Mich., 233. In both the statutes referred to the waters improved by the St. Mary's river canal and Portage canal were within the same ordinance of 1787, and were parts of our great public waters, and not logways; but Congress recognized the propriety of having the cost and current expenses of such improvements paid out of tolls. Under the constitution of this State there is no way of providing for such cases without the intervention of corporations and tolls, because the State is forbidden to make any public works at its own expense by the express terms of the constitution.

Reference was made in our former decisions, and need not be repeated, to the recognized power of States to improve their domestic waters where not in conflict with the policy of the General Government. It would be a singular state of things if nobody but Congress could improve these local waters, over which, in their natural state, the ordinary vehicles of commerce have little or no occasion or power to pass; and we do not think there is anything, either in the action of Congress or in the views thus far expressed by the United States judiciary, which in any way opposes the improvement of this river or the right to demand tolls and sue for them when not paid by the parties using the improvement.

The judgment must be affirmed with costs.

JAMES V. CAMPBELL.
THOMAS M. COOLEY.
T. R. SHERWOOD.
J. W. CHAMPLIN.

68 *Judgment Below Affirmed.* (*Law.*)

At a session of the supreme court of the State of Michigan, held at the supreme court room in the city of Lansing, on the thirtieth day of April, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Thomas M. Cooley, chief justice; James V. Campbell, Thomas R. Sherwood, John W. Champlin, associate justices.

THE MANISTEE RIVER IMPROVEMENT COMPANY, Plaintiff,
vs.
LOUIS SANDS, Defendant & Appellant.

The record and proceedings in this cause having been removed to this court by a writ of error issued to the circuit court for the county of Manistee, and the same and the matters in error assigned having been seen and inspected and duly considered by the court, and it appearing to this court that in said record and proceedings and in the giving of judgment in said circuit court there is no error: Therefore it is ordered and adjudged that the judgment of said circuit court for the county of Manistee be, and the same is hereby, in all things affirmed, and that the plaintiff do recover of the defendant its costs to be taxed, and that it have execution therefor.

69 At a session of the supreme court of the State of Michigan, held at the supreme court room in the city of Lansing, on the thirteenth day of June, in the year one thousand eight hundred and eighty-four.

Present: The Honorable Thomas M. Cooley, chief justice; James V. Campbell, Thomas R. Sherwood, John W. Champlin, associate justices.

THE MANISTEE RIVER IMPROVEMENT COMPANY, Plaintiff,

vs.

LOUIS SANDS, Defendant & Appellant.

In this cause a writ of error to the Supreme Court of the United States having been duly issued and allowed and citation issued, and the defendant having given the security required by law on the issuing of such citation, on motion of Smiley & Earle, attorneys for the defendant, it is ordered that any execution or process heretofore issued out of the circuit court for the county of Manistee and now in the hands of the sheriff of said county for collection be recalled and returned to said court, and that the collection thereof be stayed to await the determination of said writ of error in the Supreme Court of the United States.

70 7210.

Parties.	Plaintiff's attorneys.	Defendant's attorneys.
The Manistee River Improvement Company, plaintiff, *vs.* Louis Sands, defendant & appellant.	Ramsdell & Benedict, B. Hanchett. Error to Manistee.	M. J. Smiley. H. H. Wheeler, of counsel.

Costs.	Journal.	Date.	Proceedings.
		1883.	
		Nov. 27	*Præcipe* filed & writ issued, returnable Dec. 20, 1883.
		Dec. 20	Return filed.
		1884.	
		Jan. 4	Assignment of errors filed.
		Mar. 29	Note of argument, April term, filed.
	F. 584	Ap'l 25	Argued and submitted.
	" 594	" 30	Judgment affirmed with costs.
	" 636	June 13	Order entered staying execution in court below.
		" 13	Writ of error from Supreme Court U. S., allowed by Cooley, C. J., filed.
		" 13	Copy of writ of error for adverse party filed.
		" 13	Bail bond in error filed.
		" 13	Copy of bond for adverse party filed.
		July 24	Citation with proof of service filed.
		Sept. 6	Transcript of record remitted to clerk Supreme Court U. S.

71 *Citation.*

THE UNITED STATES OF AMERICA:

To the Manistee River Improvement Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Michigan, wherein Louis Sands is plaintiff in error and you are defendant in error, to show cause, if any there be, why a judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas M. Cooley, chief justice and presiding judge of the supreme court of the State of Michigan, this 13th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

THOMAS M. COOLEY,
Chief Justice Supreme Court of Michigan.

72 STATE OF MICHIGAN, } ss:
County of Kent, }

William H. Eastman, of said county, being duly sworn, deposes and says that on the fourteenth day of June, A. D. eighteen hundred and eighty-four, he served the within citation upon Ramsdell & Benedict, the attorneys of record of The Manistee River Improvement Company, within named, the defendant in error, by delivering a true copy of said citation to E. E. Benedict, one of said attorneys, personally, at his office in the city of Manistee, Michigan, and at the same time showing to the said Benedict the within original signed by the chief justice of the supreme court of the State of Michigan.

W. H. EASTMAN.

Subscribed and sworn to before me this twenty-first day of June, A. D. 1884.

SYBRANT WESSELIUS,
Notary Public, Kent Co., Mich.

[Endorsed:] 7210. Manistee River Improvement Co. *vs.* Louis Sands. Citation and proof of service. Filed July 24, 1884. Chas. C. Hopkins, clerk sup. c't of Michigan.

73 Know all men by these presents that we, Louis Sands, as principal, and Richard G. Peters and George M. Burr, as sureties, are held and firmly bound unto the Manistee River Improvement Company in the full and just sum of twenty thousand dollars, to be paid to the said Manistee River Improvement Company, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of May, A. D. 1884.

Whereas lately at a session of the supreme court of Michigan, in a suit depending in said court between said Manistee River Improvement Company, plaintiff, and said Louis Sands, defendant, judgment was rendered and affirmed against said Louis Sands, and the said Louis Sands having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Manistee River Improvement Company, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, therefore, the condition of the above obligation is such that if the said Louis Sands shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his said plea good, then the above obligation to be void; else to remain in full force and virtue.

LOUIS SANDS. [SEAL.]
RICHARD G. PETERS. [SEAL.]
GEO. M. BURR. [SEAL.]

Sealed and delivered in presence of—
GODFRED ARVESEN.
THORVALD PETERSON.

Approved by—
T. M. COOLEY,
Chief Justice Supreme Court of Mich.

74 STATE OF MICHIGAN, } *ss:*
County of Manistee, }

Richard G. Peters and Geo. M. Burr, the sureties named in the above obligation, being duly sworn, each for himself says that he is worth the sum of twenty thousand dollars and upwards over and above all debts, liabilities, and exemptions.

RICHARD G. PETERS.
GEO. M. BURR.

Subscribed and sworn to before me this 21st day of May, A. D. 1884.

[PROBATE SEAL.] ADOLPHUS MAGNAN,
Judge of Probate, Manistee Co., Mich.

[Endorsed:] 7210. Supreme court of Michigan. Manistee River Imp't Co. *vs.* Louis Sands. Bail bond in error. (Copy.) Filed June 13, 1884. Chas. C. Hopkins, clerk.

75 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before

you, between The Manistee River Improvement Company, plaintiff, and Louis Sands, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Louis Sands, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2nd Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixth day of May, in the year of our Lord one thousand eight hundred and eighty-four.

{ Seal of the U. S. Circuit Court, Western District of Mich., Southern Division. }

HENRY M. HINSDILL,
Clerk of the Circuit Court
of the United States, Western Dist. Michigan.

Allowed by—
T. M. COOLEY,
Chief Justice Supreme Court of Michigan.

76 To the Supreme Court of the United States:

The execution of the within writ appears by the transcript of record hereto annexed.

Lansing, Michigan, September 6th, 1884.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk of the Supreme Court of Michigan.

[Endorsed:] 7210. Filed June 13, 1884. Chas. C. Hopkins, clerk supreme court of the State of Michigan. M. J. Smiley, att'y for pl'ff in error.

77 STATE OF MICHIGAN:

In the Supreme Court.

THE MANISTEE RIVER IMPROVEMENT COMPANY, Plaintiff,

vs.

LOUIS SANDS, Defendant and Appellant.

STATE OF MICHIGAN, *ss:*

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the above and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court as appears of record and on file in my office; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof.

That attached thereto are the writ of error with allowance endorsed thereon, the citation with proof of service, copy of bond to the adverse party filed with the writ of error.

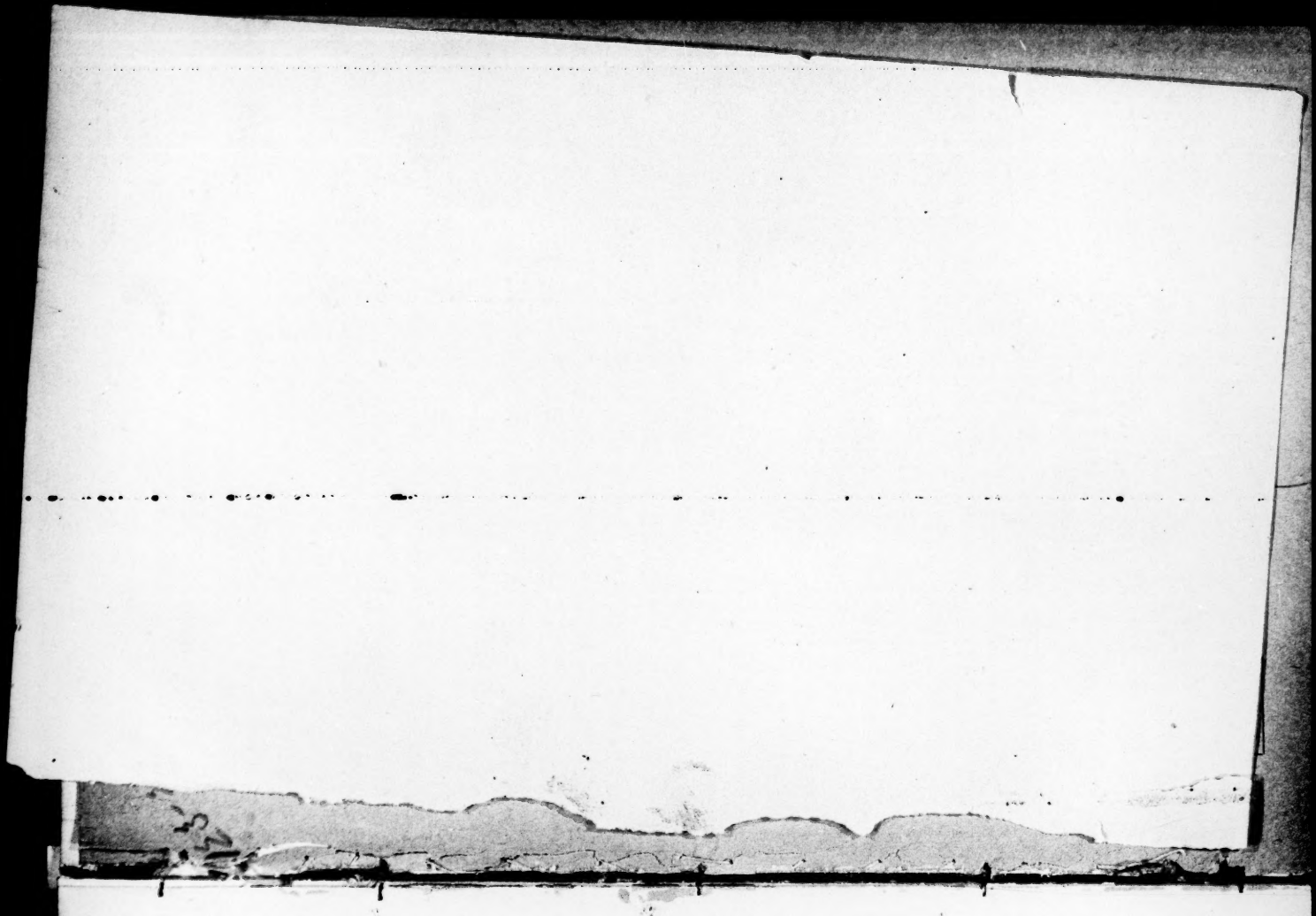
That at the time the said writ of error was served upon me there was lodged with me for the adverse party a copy of such writ.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this sixth day of September, A. D. 1884.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk of the Supreme Court of Michigan.

Endorsed on cover: Michigan supreme court. No. 313. Louis Sands, plaintiff in error, *vs.* The Manistee River Improvement Company. Filed 25 September, 1884.



SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1887.

No. 40.

LOUIS SANDS,
Plaintiff in Error,
vs.
THE MANISTEE RIVER IMPROVEMENT COMPANY.

In Error to the Supreme Court of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

M. J. SMILEY,
Counsel for Plaintiff in Error.

GRAND RAPIDS, MICH.:
EATON, LYON & ALLEN PRINTING CO.
1887.

Supreme Court of the United States.

LOUIS SANDS,
Plaintiff in Error,
vs.
THE MANISTEE RIVER IMPROVEMENT COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

The Manistee River Improvement Company, a corporation organized under the statute of Michigan authorizing the formation of corporations for the improvement of navigable rivers within that State, purporting to authorize such corporations to improve the navigable rivers of said State, and to receive tolls for the use of such improvements, brought this action in the State Court of Michigan against Louis Sands to recover certain tolls which it alleged were due to the plaintiff from the

defendant for the use of such improvements in running pine saw logs through the said Manistee river, including the portion of the stream upon which the plaintiff's improvements had been made.

The State law under which said corporation was organized will be found in the compilation of Michigan laws for 1871 beginning at page 901, and is printed as an appendix to this brief.

Section one of said act provides that any number of persons may associate together for the purpose of improving the navigation of any river in the State by deepening the channel thereof, and the construction of dams therein and canals to connect therewith, and to take and receive such amount of tolls for the passage of vessels, boats, rafts, lumber, timber and logs as the board of control may prescribe.

Section four of said act provides that no company so formed shall be authorized to improve the navigation of any stream until it shall obtain the consent in writing of the Governor and Attorney General.

Section five provides that such company shall, after it is organized, prepare a map and plan of the stream which they propose to improve, showing the nature and character of the improvements to be made, and submit it to the board of control for its approval. The board of control shall examine the same, and if it shall conclude that the improvements

will be a public benefit, and the company is a proper one to make the same, they shall endorse their approval upon the map and plan, and their consent to the construction of the improvements proposed, and fix the time within which the same shall be completed:

Said section five as it existed before the organization of this corporation made no provision for any notice by publication or otherwise of the hearing before the board of control. It has since been amended so as to provide for such notice, such amendment being approved April 17, 1871. (See Laws of Michigan, 1871, page 326.) The printed appendix in this brief gives the law as it was originally passed and as it stood until April 17, 1871.

Section fifteen of said act provides that whenever any portion of said work shall be completed to the satisfaction of said board of control, and it is so far useful that in the opinion of said board of control tolls should be paid for the use thereof, said board may fix the tolls to be paid for the use of such portion until the whole of said work is completed, and whenever said improvements have been completed and accepted by the said board of control the rates of tolls or fare which any company organized under this act may charge for running vessels, boats, rafts, lumber, logs and timber through said improved stream shall be fixed by said board of control and may be graduated with reference to the

distance run upon said river, and shall not be increased without the consent of said board of control, but may be changed from time to time by said board. But such tolls shall not at any time be increased so that the same shall amount to more than fifteen per cent. a year upon the actual cost of such improvements after deducting the necessary expenses and repairs; and the said board shall as far as may be practicable so fix the rates of toll on timber, logs and lumber that the same shall not at any time exceed the sum of twenty-five cents per thousand feet, board measure, on any stream where ten million feet of logs or less are run in any one year; twenty cents per thousand feet board measure on any stream where thirty million feet or less are run in any one year; nor more than fifteen cents per thousand feet board measure on any stream where from thirty to fifty million feet are run in any one year; nor more than ten cents per thousand feet board measure on any stream where from fifty to one hundred million feet or less are run in any one year; nor more than five cents per thousand feet board measure on any stream where from one hundred to two hundred million feet are run in any one year. And the collection of such tolls shall be confined strictly to that portion or part of the river so improved and to that class of floatables benefited by the improvements. And nothing in this act shall be construed to give jurisdiction to any corporation over any portion of a river or stream other than the portion

specifically improved by said corporation. Such corporation shall cause to be made out and filed with said board of control, at or before its meeting on the last day of March of each year, the affidavit of its president or one of its directors setting forth, in detail, upon his best information and belief, what amount of timber, logs and lumber will be run through any section or sections of the river improved by the company during that year, and that the official has made due and reasonable inquiry on the subject from persons lumbering on the river, and otherwise.

Section sixteen of the act provides that any stream improved under this act shall be open to all persons for use upon the payment of tolls prescribed, as aforesaid, and uniform rates of tolls shall be charged to all persons, whether stockholders in such company or not.

Section seventeen provides that tolls may be collected by an action of assumpsit.

Section eighteen provides that the company shall have a lien upon all the logs or other floatables driven, rafted or run through such stream or waters for such toll, and may sell a sufficient quantity of the logs or other floatables to satisfy such claim or demand and the charges for such sale.

Section twenty-four of the act provides that on or before the first Monday in January in each and every year it shall be the duty of the board of di-

rectors of every company formed under this act to report to the Secretary of State, under the oath of at least two of the directors, the length of the stream or waters so improved, the cost of such improvements, the amount of money expended, the amount of capital, how much of the same is paid in and how much is expended, the whole amount of tolls or earnings expended in such improvements, the amount received during the previous year for tolls and from all sources, stating each separately; the amount set apart for repairs; the amount of dividends made and the amount of indebtedness of such company, specifying the object for which such indebtedness was accrued.

Section 5471 of Howell's Statutes of Michigan provides that the board of control of the St. Mary's Falls Ship Canal shall be composed of the Governor, Auditor General and State Treasurer, and provides that they shall have general direction, care and supervision of said canal and the property belonging thereto.

The Plaintiff was organized in the year eighteen hundred and seventy. After its organization a plan of the proposed improvements was submitted to and approved by the board of control, consisting of the Governor, State Treasurer, and Auditor General. It also had the consent of the Governor and Attorney General to make the proposed improvements.

It also made certain improvements in the river, facilitating, as it is claimed, the running of logs through the improved parts of the river. The board of control fixed the rates of toll in each year for several years after the improvements were partially completed, and afterwards when they were completed, including the years 1878, 1879, 1880 and 1881. This action was brought to recover tolls upon logs for the years 1878, 1879, 1880 and 1881. (See the Record, page 18.) These rates of toll were fixed by said board without any notice to any one interested in the amount of said tolls, and it is conceded that the law did not provide for any such notice by publication or otherwise, and according to the decisions of the Supreme Court of Michigan such fixing of rates by the board is conclusive upon all parties interested and is not subject to review by any court, either upon the question of whether the tolls have been lawfully fixed within the limits prescribed by the law, or whether the tolls are reasonable in amount.

In the trial court the plaintiff in error defended upon the ground that the statute of Michigan, as thus expounded by the Supreme Court of Michigan, was unconstitutional and void, as being opposed to the 5th and 14th amendments of the Constitution of the United States; and also upon the ground that said law is invalid, as being opposed to Section 10, Article 1, of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of a contract.

The counsel for the defendant requested said Court to charge the jury as shown upon pages 16 and 17 of the Record: First, That the Statute of the State of Michigan, purporting to give to the board of control authority to fix the rates of tolls which should be paid for the use of the alleged improvements of the plaintiff, were illegal and void, and opposed and contrary to the 14th amendment of the Constitution of the United States, which, among other things, provides that no State shall deprive any person of his life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws; and also that the said statute purporting to give the said board of control authority to fix the rates of tolls for the alleged improvements of the plaintiff, provides for no notice to parties interested in the fixing of said tolls, provides no means by which log owners shall be notified, or may be heard on the subject of fixing said tolls, provides no means by which the action of said board of control may be reviewed, and is void as opposed to said 14th amendment.

Also that said Statute of Michigan, purporting to give said board of control arbitrary and unlimited power to levy tolls upon the logs passing through said improved portion of the Manistee River, provides no means by which the parties owning such logs may test either the fixing of said tolls, in the first instance,

or the validity or propriety of the rates fixed afterwards, and, in effect, attempts to deprive persons of their property without due process of law, and is in conflict and contrary to said amendment.

Also, that, for the same reasons named in the foregoing three requests, said statute is also opposed to the 5th amendment of the Constitution of the United States.

Also, that the said law, authorizing the improvement of rivers and the collection of tolls for such improvements, is void as opposed to Section 10, Article 1, of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of a contract; that said law seeks to impair the obligation of the contract or ordinance of 1787, so-called, which gave to the people of the northwest territory the right to the use of the navigable waters leading into the St. Lawrence, etc., without any tax, levy or duty therefor.

The Court was further requested to charge that upon the whole record, and the evidence as introduced in the case, the plaintiff was not entitled to recover, and that the defendant was entitled to the verdict of the jury in his favor. The said Court refused to give any of the requests aforesaid, and charged the jury upon his own motion that it was competent for the Legislature of Michigan to make the law under which the im-

provement company had acted, and also that it was competent for the board of control, under said law, to fix the tolls for the years in question, and that the plaintiff was entitled to recover the amount due it according to said rates for the use of the improvements in 1879, 1880 and 1881. (See Record, page 18.)

Exceptions were taken by the defendants to each of the refusals to charge as requested, and also to the charge of the Court upon its own motion. Under this charge the jury rendered a verdict in favor of the plaintiff for the sum claimed.

The case was then removed to the Supreme Court, and among the errors there assigned were the following:

The Court erred in refusing to charge the jury, as requested by the defendant in his first written request, to the effect that the Statute of the State of Michigan, purporting to give to the board of control authority to fix the rates of tolls which should be paid for the use of the alleged improvements of the plaintiff, is illegal and void as contrary to the 14th amendment of the Constitution of the United States; also, that the Court erred in refusing to charge the jury as requested by the defendant in his second request to charge, in substance, that the said statute is void as contrary to the said amendment, because it provides no means by which log owners shall be notified or may be heard, and no

means by which the said proceedings may be reviewed. Also, that the Court erred in refusing to charge the jury as requested in the defendants third written request to charge that said statute attempted to give said board of control arbitrary and unlimited powers to levy tolls and take property without the opportunity of contesting said right on the part of the parties whose property is taken, is void as opposed to said amendment. Also, in refusing to charge as requested by defendants fourth request that said law was opposed to the fifth amendment of the Constitution of the United States. Also, in refusing to charge as requested in the fifth written request that said law impaired the obligation of a contract. Also, in refusing to charge the jury that upon the whole record and evidence the defendant was entitled to the verdict of the jury; and, also, that the Court erred in charging the jury upon his own motion that it was competent for the board of control to fix said tolls, and the plaintiff was entitled to recover them. (See Record, paragraphs 59 and 60, pages 30 and 32.)

The Supreme Court of Michigan heard the case upon writ of error, and affirmed the judgment of the Court below. The case as decided by the Supreme Court of Michigan is reported in 53d of Michigan, page 593.

The plaintiff in error here assigns the same errors which were assigned in the Supreme Court of Michigan. (See Assignment of Errors, Appendix

"A".) And it is now claimed by the plaintiff in error that said statute of Michigan, as interpreted and expounded by the Supreme Court of that State, is unconstitutional and void, being opposed to the 14th amendment of the Constitution of the United States, prohibiting the States from depriving any person of their property without due process of law, and denying to any person within its jurisdiction the equal protection of the laws.

It is important, in the consideration of this question, that the Court should understand the decisions of the Supreme Court of Michigan with reference to this law. This law and its interpretation first came before the Supreme Court of Michigan in the case of Benjamin vs. The Manistee River Improvement Company, 42d of Michigan, 628, upon a writ of quo warrant, filed by the State upon the relation of Benjamin against the Manistee River Improvement Company, to enquire by what authority it claimed to collect tolls upon the Manistee River. The respondent in this case set forth its incorporation, that it has been authorized and permitted to make the improvements it made, and was authorized by said law and the proceedings of the board of control to collect tolls upon the river. It was claimed by the relator that the improvements were not of the character authorized by the law to be made, that the law was opposed to the ordinance of 1787 and the Constitution of the State securing free navigation, and, also, that the law was invalid

because it purported to authorize the board of control to fix the rates of toll without any given notice or opportunity to be heard by the parties interested. These several positions of the relator were over-ruled, and it was there held that the navigable waters of the United States, although forever free, are subject to State control and regulations and may be improved by the States and tolls charged therefor. That said law was not in violation of the provisions of said ordinance or of the said constitution securing free navigation. That the fixing of tolls by the board of control was not judicial, but administrative in its character, and therefore required no notice of hearing and was not subject to any review by the Courts. That the authority conferred upon the board was discretionary and exclusive, and the tolls when fixed by them must be paid and not questioned in any Court. This law came to the Court again in the case of the Manistee River Improvement Company vs. Lamport, 49th of Michigan, 442. In that case the defendant sought to escape payment of tolls upon the ground that they were excessive and unreasonable, and that the plaintiff had by false and fraudulent representation induced the board of control to fix the rates at an excessive and unreasonable sum and higher than they were permitted to fix the rates by the terms of the statute. But this defense was over-ruled, and it was held that the authority conferred upon the board to fix the rates of tolls is unlimited; that the rates, when fixed by them, are not open to

review, except by the action of the board itself. That their action cannot be reviewed by the Courts in an action to recover the amount of tolls in any case, and that their action could not be resisted on the ground that the tolls were excessive, or that the board had been imposed upon in fixing them. The present case was made up for the purpose of testing the question involved, and came before the Supreme Court of Michigan in Manistee River Improvement Company vs. Sands, 53d of Michigan, 593, as before stated, and the previous decisions of the Supreme Court of Michigan were there adhered to.

In the Benjamin case, 42d of Michigan, 633, Judge Cooley, in delivering the opinion of the Court, said: "The first objection to the statute is that it is in conflict with the article of compact in the ordinance of 1787, which provides that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefor." These articles were expressly declared to be perpetual and the Constitution of the State recognizes the right secured in the provision that "No navigable stream in this State shall be either bridged or damned without authority from the

board of supervisors of the proper county, under the provisions of law. No such law shall prejudice the right of individuals to the free navigation of such streams or preclude the State from the further improvement of the navigation of such streams."

Citing Constitution of Michigan, Article 18, Section 4.

"It is conceded that a legislative act in violation of the true intent of the constitutional provision would be invalid. It is also conceded that the article copied from the ordinance of 1787 was intended to give permanent and inviolable rights, and that whether superceded by the Constitution of the State or left according to the terms of the ordinance as a 'perpetual compact' is not matter of importance in this case, since either by the ordinance or by the Constitution the use of the navigable streams of the State is free to all people. The important question is what is meant by free navigation, and whether the taking of tolls for the use of improvements is a violation of the compact or of the Constitution in the true intent and meaning of either."

This is cited for the purpose of showing that it was admitted and conceded by the Supreme Court of Michigan that every person had an interest in and a right to the free use of the navigable streams of the State in their natural condition, and that the improvements of the stream only were or could be charged for.

Upon the further question involved in the Benjamin case, whether the law was valid in not providing for any notice or hearing, Judge Cooley said: "It was argued for the relator that the hearing for the establishment of tolls was in its nature a judicial hearing, of which all parties concerned were of right entitled to have notice. If that were the case it would obviously be impossible to give notice except in some general form of publication, since it could never be known in advance who the parties interested would be. The parties concerned in the tolls would be the parties who might have occasion to make use of the river for the purpose of navigation, and these might or might not be the owners of the banks or persons living near them, or even persons living in the State. But in truth the fixing upon the amount of tolls is no more a judicial act than is the fixing of rates of fare of transportation by railroads, or the weight of a bushel of grain, or the speed of trains through towns, or the rules for the going at large of animals. A judicial act implies a controversy between parties to which the law is applied, but the fixing of tolls is only prescribing a law in advance for the government of those whose occasion may bring them within its provisions.

"But it is said that the statute under which the Respondent is incorporated is invalid because it confers upon the board of control the power to fix and establish tolls, but does not require its mem-

bers to make any personal inspection of the river proposed to be improved, or provide any means for evidence upon which the board may determine the necessity for the improvements, or when the works are completed or so far constructed as to entitle the Respondent to collect tolls, or give any hearing to parties interested, or contemplate that the board shall act upon anything but the ex-parte statement of one of the corporate officers.

"It must be admitted that the statute provides for no hearing of the parties whose interests may be affected by the improvement, except when the board meet to consider the plan proposed for the improvement."

This is cited for the purpose of showing that it was conceded by the Supreme Court of Michigan that the statute does not provide for any hearing of the parties upon the subject of the reasonableness or validity of the tolls as fixed by the board of control.

All rivers capable of valuable floatage are navigable, and in such the public have by the common law, as well as by the Constitution of Michigan, an inherent right to navigate their waters. See Angel on Water Courses, Sec. 535, where it is said, "All the citizens of a country have by the common law an inherent right in common to navigate its navigable waters, not tide waters only but also navigable fresh waters, rivers and lakes, and of this right

they cannot be deprived by the sovereignty of any government based upon an acknowledgment of the rights of the citizens." Citing Moor vs. Vesey, 32 Maine, 356. See also Lorman vs. Benson, 8th of Mich., 18; Morgan vs. King, 35th N. Y., 454.

In Morgan vs. King, 35th N. Y., 459, above cited, it is said, "The true rule is that the public have a right of way in every stream which is capable in its natural state, and its ordinary volume of water, of transporting, in a condition for market, the product of the forest or mines, or of the tillage of the soil upon its banks. It is not essential to the right that the property to be transported should be carried in vessels or in some other way whereby it can be guided by the agency of man. If it is so far navigable and floatable in its natural state and its ordinary capacity as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported."

See also Thunder Bay River Booming Co. vs. Speechly, 31st Mich., 335.

In LaPlaisance Bay Harbor Co. vs. the City of Monroe, Walker's Chancery Reports, it was held that navigable waters are public highways at common law, and the only object of the clause in the ordinance of 1787 relating thereto was to secure to citizens of the confederate states such rights in relation to those waters within the territory northwest of the Ohio as were already possessed by the

inhabitants of the territory and to prevent any tax or duty on persons navigating them.

See also Moore vs. Sanborne, 2d of Mich., 520.

This right was secured to the people of the northwest by the ordinance of 1787, and since the adoption of the Constitution of Michigan is secure to the people of that State by the Constitution.

See opinion of Judge Cooley in Benjamin vs. the Manistee Improvement Co., 46th of Mich., 663.

The log owner then has the right to navigate the river in its natural state free.

After the improvement of the river he cannot use it in its natural state without using the improved portion thereof; he cannot use it in its natural state free, nor can he use it at all, according to the Michigan decisions, without submitting to such exaction, reasonable or unreasonable, lawful or unlawful, as the board of control may see fit to impose without any notice to him, or without giving him any opportunity to be heard upon the lawfulness or reasonableness of such exaction. By the law in question the defendant is deprived of his right to the use of the stream in its natural condition and charged for the use of the improvements in the river without being consulted, without his consent, without notice and without any opportunity of being heard as to the amount of toll which he shall pay for the use of the improvements, or how

much of his property shall be taken for the use of said improvements.

It was held by the Supreme Court of Michigan in the cases hereinbefore cited, and especially in the Benjamin case, that the power of fixing the rate of toll exercised by the board of control is administrative and not judicial in its character, and that because of this the defendant's property may be taken without any notice and without any opportunity of being heard. But it has been held by very high authority that whatever the nature of the proceedings by which one is deprived of his property, whether judicial or administrative, or whether the property is taken directly, or whether a charge is created which is the basis of taking it, the law must provide for some kind of notice and give the owner an opportunity to be heard or "the proceeding will want the essential ingredient of due process of law."

See San Mateo County vs. Southern Pacific R. R. Co., 13 Fed. Rep., 722.

Burns vs. Multomah R. R. Co., 15 Fed. Rep., 177.

County of Santa Clara vs. Southern Pacific R. R. Co., 18 Fed. Rep., 385.

Stewart vs. Palmer, 74 N. Y., 183.

Lavin vs. The Savings Bank, 18th of Blatchford, 1-27.

In the cases above cited it is also held that it is not enough that a hearing may be held as a matter of favor, but that the statute under which property is taken must provide for a hearing as matter of right.

See also Ames vs. Port Huron Log Co., 11th of Mich., pages 139 and 147.

In the case last above cited the legislature of Michigan passed an act authorizing certain corporations formed under it to assume the control and management of logs found floating in the navigable streams, to run them to their destination and enforce compensation against the logs for thus controling them without the consent of the log owners. It was held that said law was unconstitutional; that it deprived persons of their property without due process of law. The corporation sold some logs to satisfy their lien upon them, and an action was brought by the log owner to recover the value of the logs alleging that the law under which the company proceeded was unconstitutional and void. In delivering the opinion of the court Judge Campbell said: "It was decided in Moore vs. Sanborne, 2d of Mich., 519, that there was a common right of floatage in all streams susceptible of valuable use for lumbering. * * * We are met therefore at once by the question whether on a stream open to all persons, whether citizens or aliens, who may choose to assume a corporate character to control or authorize their servants and agents to control

the property of those who are lawfully entitled to free navigation.

It is difficult to perceive by what process a public office can be obtained or exercised without either election or appointment. The powers of government are parceled out by the Constitution, which certainly contemplates some official responsibility. Every officer not expressly exempted is required to take an oath of office as a preliminary to discharging his duties. It is absurd to suppose that any official power can exist in any person by his own assumption or by the employment of some other private person, and still more so to recognize in such an assumption a power of depriving individuals of their property. Such claims are inconsistent with any idea of government whatever, and it is plain that the exercise of such a power is an act in its nature public and not private.

The case, however, involves more than the assumption of control. The corporation, or rather its various agents, must of necessity determine when a case arises justifying interference, and having assumed possession, it assesses its own charges, and having assessed them proceeds to sell the property seized to pay them, with the added expenses of such sale. These proceedings are all ex parte and are all proceedings in invitum. Their validity must, therefore, be determined by the rules applicable to such casss.

Except in those cases where proceedings to collect the public revenue may stand upon a peculiar footing of their own, it is an inflexible principle of constitutional right that no person can legally be divested of his property without remuneration, or against his will, unless he is allowed a hearing before an impartial tribunal, where he may contest the claim set up against him and be allowed to meet it on the law and the facts. When his property is wanted in specie for public purposes, there are methods assured to him whereby its value can be ascertained. Where a debt, or penalty or forfeiture may be set up against him, the determination of his liability becomes a judicial question, and all judicial functions are required by the Constitution to be exercised by courts of justice or judicial officers regularly chosen. He can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination. When a company proceeds under this statute to take charge of logs in the stream several questions of a judicial nature present themselves. The principal are, first, whether the circumstances exist which give the right of interference with the property in the stream; second, whether the company actually assumed charge of it and safely and diligently moved and delivered it, and third, what was the legitimate expense of performing the services. All these involve questions of fact upon which there might easily be conflicting testimony. A party whom it

is sought to charge has a right to have these questions of fact settled before he can be compelled to pay such demands or to have his property sold to satisfy them. If such a case does not come within the familiar constitutional rules, which assure to everyone the right of due process of law, which preserve the right of trial by jury and which vest judicial powers in stable hands, it would be difficult to find any meaning in those maxims. They have been so frequently and uniformly applied in cases like this that a citation of adjudged cases appears a useless ceremony. No case can be found anywhere which would remove these questions from judicial cognizance.

The statute under which the company defendant was incorporated not only makes all proceedings ex parte, but makes the company judge in its own cause and empowers it to execute its own judgments. Such a proceeding is too plainly illegal to admit of an extended argument.

"In the railroad tax cases, 13th Fed. Rep., 722, the question arose as to the right of the State of California to assess and levy taxes upon a railroad company without notice and without an opportunity of being heard upon the propriety and validity of the assessment. It was there held that equal protection of the laws to any one implied not only that he has a right to resort, on the same terms with others, to the courts of the country for the security of his person and property,

the prevention and redress of wrongs and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind and among them that of unequal taxation."

Upon the subject of due process of law Mr. Justice Field said, "The provision in this amendment is in the form of an interdict upon the States—"Nor shall any State deprive any person of life, liberty or property without due process of law." And by due process is meant one which, following the forms of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained, and it must give to the party to be affected an opportunity of being heard respecting the justice of the judgment sought. Without these conditions entering into the proceeding it would be anything but due process. If it touched life or liberty it would be wanton punishment, or rather wanton cruelty; if it touched property it would be arbitrary exaction.

It is significant that the guaranty against the deprivation of property without due process of law is contained in the clause which guarantees against a like deprivation of life and liberty; and it means that there shall be no proceeding against either without the observance of all the securities appli-

cable to the case recognized by the general law, by those principles that are established in all constitutional governments for the protection of private rights. Notice is absolutely essential to the validity of the proceeding in any case; it may be given by personal citation, and in some cases it may be given by statute, but given it must be in some form. If life and liberty are involved, there must be a regular course of judicial proceedings; so, also, where title or possession of property is in contention. But in the taking of property by taxation the proceeding is more summary and stringent. The necessities of revenue for the support of government will not admit of the delays attendant upon judicial proceedings in the courts of justice. The statute fixes the rates of taxation upon the value of the property and appoints officers to estimate and appraise its value. Due process of law in the proceeding is deemed to be pursued when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the correctness of the assessment and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient if the time and place of hearing be designated by statute. But whatever the character of the proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly, or creates a charge or liability which may

be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensible to the validity of the proceeding."

In the same case, on page 762, Judge Sawyer said, "It is enough to say that it has been settled by judicial decision, as I think, that whether the proceeding be judicial, administrative or executive, if it affects life or liberty, or takes property directly, or imposes a charge which becomes the basis of taking property, some kind of notice, or opportunity to be heard in his own behalf and to defend his rights, given to the person whose life or liberty is to be affected, or whose property is to be taken or burdened with the liability, is an indispensible element—an essential ingredient of 'due process of law.' No one, I apprehend, would for a moment contend that a man's life, or his liberty, could be legally taken away without notice of the proceeding or without being offered an opportunity to be heard; or that a proceeding whereby his life or liberty should be forfeited or permanently affected, without notice or opportunity to be heard in his own defense, could, by any possibility, be by 'due process of law.' In such cases there could be no

just conception of 'due process of law' that would not embrace these elements of notice and opportunity to be heard. Any conception excluding these elements would be abhorrent to all our ideas of either law or justice. If these elements must enter into and constitute an essential part of due process of law, in respect to life and liberty, they must also constitute essential ingredients in due process of law, where property is to be taken; for the guaranty in the constitution is found in the same provision, in the same connection and in the identical language applicable to all."

In Stewart vs. Palmer, 74th of N. Y., it was held that a law imposing an assessment for a local improvement without notice of hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed, has the effect to deprive him of his property without due process of law; that the legislature may prescribe the kind of notice and the mode in which it may be given, but it cannot dispense with all notice; that it is not enough that the owner may by chance have notice, or that he may, as a matter of favor, have a hearing. The law must require a notice to him, and give him a right to a hearing and an opportunity to be heard; also, that it is immaterial that the assessment has been fairly apportioned. The constitutional validity of the act has to be tested, not by what has been, but by what may be done under it. See opinion of Judge Earle on page 188.

We submit, however, that the powers exercised by the board of control are clearly judicial, because 1st. The board is required to determine when the work is completed so that the corporation is entitled to collect tolls; 2d. It determines when and whether the improvements are valuable and useful, so that the log owners should pay tolls for their use; 3d. It determines the cost of the improvements and the amount required by the corporation for its necessary expenses and repairs; 4th. It determines how many logs will be run through the improved portion of the stream during the current year for which it fixes tolls; 5th. It determines, and fixes by its decision, the rates of toll which the log owner shall pay to the improvement company, and in doing so necessarily passes upon what is lawful and reasonable. All of these questions which it is called upon to determine require inquiry judicial in its nature. They necessarily require evidence, investigation, consideration and judgment. The law contemplates that the board, if it keep within its jurisdiction, shall settle the rights of the parties; how much the log owners shall pay, and how much the corporation shall receive as a reasonable compensation for the use of the improvements, and they do settle the rights of the parties prima facie, at least, and, according to the decision of the Supreme Court of Michigan, conclusively.

The rights which the board is called upon to determine are between private parties. They admin-

ister no public right, but they determine how much one private party shall pay to another for the use of certain improvements. The public has no power to collect tolls; the State is prohibited from so doing by the Constitution of Michigan and by the decision of its Courts. (See Constitution of Michigan, Article 14, Section 9, as cited in the Benjamin case, on page 635.)

The decision of the board of control has the effect to transfer from one private party to another a portion of his private property.

It cannot be said that tolls for the use of the improved river are like freight rates upon railroads and canals. In the case of freights, the State creates or authorizes the construction of the highway in the first instance. The party using the highway has no right or interest in it, except as it is given such right by the State. The party can use or not use the highway at his election, but in the case of these tolls the navigable stream is a highway by nature, in which the party has an interest, and all that can be required of him is that he shall pay a reasonable toll for the difference between the highway in its natural state and in its improved condition.

The log owner has not an opportunity to elect whether: (1.) He will use improvement or not at the prices fixed for the improvement, but must use it at the prices fixed, or else lose his right to use it

at all. (2.) The value of his property, to a large extent, depends upon his right to use this public highway as a means of transporting his timber to market. There are no other means of transportation available. (3.) Logs are run through the stream, and the improved portion thereof, during the entire year, before, as well as after the time named by the statute for fixing the tolls, and a part of the logs having been run through the river before the tolls are fixed, the log owner has no choice as to whether he will use the improvements at the prices fixed or not. After a portion of his logs have been run, the board of control fixes a sum which shall be paid by him for so putting his logs through the improvements.

It may be conceded for the puposes of our case that the State has power and authority to authorize the improvement of a navigable stream, situated wholly within the State, by a corporation, and authorize the collection of reasonable tolls for the use of such improvements.

Still it is a fundamental principle that all tolls must be reasonable. The corporation renders its services in a public employment and charges for the use of property in which the public has an interest. Therefore, every person having occasion to use the improvements of the plaintiff has a right to use them for a reasonable compensation, and the law must protect him in such use. A law which authorizes the collection of tolls for the

use of property employed in the public service, and in which the public have an interest, must protect the public and provide the means whereby the public may have the use of such property without paying arbitrary and unreasonable tolls therefor. (See Munn vs. Ill., 94th U. S., 113. Chicago, etc., R. R. vs. Iowa, 94th U. S., 155.)

The objection which we make to this law is that it provides no means by which the log owner can be assured that reasonable rates will be charged for the use of the improvements. He is entirely at the mercy of the board authorized to fix rates. He has no notice of the proceeding by which rates are fixed, and has no opportunity at any stage of the proceeding to be heard upon the subject or to contest in any action the reasonableness of the tolls as fixed; and inasmuch as this law, as expounded by the Supreme Court of Michigan, prohibits and cuts off all inquiry upon the legality or reasonableness of the action of this board, it is not due process of law within the meaning of the Constitution of the Unted States.

While admitting the right of the State, therefore, to authorize the improvements and provide that reasonable compensation shall be made for the use of them, we deny the right of the State to make and enforce a law which shall result in exacting unreasonable compensation and deny to the person interested any right or opportunity to contest the

legality and propriety of the means by which he is in effect deprived of his property.

The construction placed upon the law by the Supreme Court of Michigan is to be regarded here as a part of the law itself in determining whether the law is in conflict with the Constitution. The question is whether the law as expounded by the courts of Michigan is valid.

In the Railroad Commission cases, 116th U. S., 331, it was declared that all charges for transportation must be reasonable, and it was further said that "Under pretense of regulating fares and freights the State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law. What would have this effect we need not say."

In People vs. Mayor of Brooklyn, 4th of N. Y., 431, it was said in speaking of tolls taken for bridges and turn-pike roads, "The money for their construction and maintenance is reimbursed by means of tolls. Tolls are delegated taxation, and this taxation is charged and apportioned upon those only who derive benefit from the original expenditure and in proportion to that benefit."

As all tolls must be reasonable and apportioned upon those only who derive benefit for which they pay tolls, every law which authorizes the collection

of tolls should provide some means by which reasonable tolls only should be collected; and any law which exacts tolls and fails to do this should be declared invalid.

In Transportation Co. vs. Parkersburg, 107 U. S., 699, it is said with reference to wharfage, "It is undoubtedly a general rule of law in reference to all public wharves that wharfage must be reasonable." Sir Matthew Hale is quoted where he says, "If the King or subject have a public wharf unto which all persons that come to that port must come and unlade and lade their goods, as for the purpose because they are the wharfes only licensed by the King, according to the statute of First Elizabeth, II, or because there is no other wharf in that port, as it may fall out where a port is newly erected, in that case there cannot be taken arbitrary and exclusive duties for cranage, wharfage or pesage, neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the King's license or charter."

"Be this, however, as it may, it is an undoubted rule of universal application that wharfage for the use of all public wharves must be reasonable."

In Ouachita Packet Co. vs. Aikin, 121 U. S., 449, it is said that "Where wharfage charges are unreasonable the remedy must be sought by invoking the laws of the State," which cannot be done in

this suit, inasmuch as the jurisdiction of the court is rested upon the supposed unconstitutionality of the charge for wharfage.

In the present case the law authorizing the collection of tolls is claimed to be invalid; not only because the tolls are unreasonable, but because the law of the State as administered by its courts sanctions the unreasonableness and unlawfulness of the tolls, and provides a means of levying and enforcing such tolls without securing to the party in interest any hearing or any opportunity of contesting in the courts or elsewhere the validity or propriety of the charge. And we submit that because this law provides the means of so enforcing such a charge and creates a lien upon the log owners' property, which when enforced has the effect to deprive him of that property, such law is unconstitutional and one which the State has no right to make or enforce in the face of the provisions contained in the 14th Amendment.

M. J. SMILEY,
Counsel for Plaintiff in Error.

APPENDIX A.

Supreme Court of the United States.

LOUIS SANDS,
Plaintiff in Error,
vs.
THE MANISTEE RIVER IMPROVEMENT COMPANY.

ASSIGNMENT OF ERRORS.

And now comes the said plaintiff in error and says that in the record and proceedings in said cause in the Supreme Court of Michigan there are manifest errors in the following particulars, to wit:

I.

The said court erred in sustaining the refusal of the Circuit Court for the County of Manistee to charge as requested by the defendant in his first written request, viz: That the statute of the State of Michigan purporting to give to the board of control authority to fix the rates of toll which should be paid for the use of the alleged improvements of the plaintiff is illegal and void, as contrary to the 14th Amendment of the Constitution of the United States.

II.

The said court erred in sustaining the said Circuit Court in refusing to charge the jury as requested by the defendant in his second request to charge in substance, that the said statute is void as contrary to said amendment, because it provides no means by which log owners shall be notified or may be heard, and no means by which the said proceedings may be reviewed.

III.

The said court erred in sustaining said Circuit Court in refusing to charge the jury as requested by the defendant in his third request to charge, in substance, that said statute attempts to give said board of control arbitrary and unlimited powers to levy tolls and take property without an opportunity of testing said right on the part of the parties

whose property is taken, and is void as opposed to said amendment.

IV.

The said court erred in sustaining the said Circuit Court in his refusal to charge the jury as requested, that the said statute of the State of Michigan provides no means by which the parties owning logs may contest either the fixing of said tolls, in the first instance, or the validity or propriety of the rates fixed afterwards; and in effect attempts to deprive persons of their property without due process of law, and is void as being in conflict with the 14th Amendment of the Constitution of the United States.

V.

The said court erred in sustaining the charge of the Circuit Court for the County of Manistee in his ruling that the said statute under which the plaintiff was organized was valid and constitutional, that the legislature of Michigan had authority to pass such act, that the board of control had authority to fix the rates of tolls as they did, and that the plaintiff was entitled to recover upon the whole record.

VI.

The said court erred in holding that said law of Michigan did not violate a contract and was therefore not in conflict with the Constitution of the United States.

VII.

The said court erred in holding and deciding that said statute of Michigan as expounded by it is constitutional and valid.

And for the errors aforesaid, the said plaintiff in error prays that the said judgment may be reversed, annulled, set aside and held for nought.

M. J. SMILEY,
Of Counsel for Plaintiff in Error.

APPENDIX B.

[No. 149]

AN ACT to authorize the formation of corporations for the purpose of improving the navigation of rivers.

SECTION 1. *The People of the State of Michigan enact*, That any number of persons may associate for the purpose of improving the navigation of any river in this State, by deepening the channel thereof and the construction of dams therein, and canals to connect therewith, upon such terms and conditions, and subject to such liabilities as are prescribed in this act, and to take and receive such amounts of toll for the passage of vessels, boats, rafts, timber, logs, and lumber through such river when the navigation shall be thus improved, as the board of control of the St. Mary's Falls Ship Canal may prescribe, as herein provided.

SEC. 2. Such persons, under their hands and seals, shall make a certificate which shall specify:

1. The name of the corporation;

2. The stream and section of the stream, the navigation of which it is proposed to improve;

3. A statement of the amount of capital stock of such company, and the number of shares into which the capital stock shall be divided;

4. The names and places of residence of the stockholders, and the number of shares held by each of them respectively;

5. The names of the first directors, being not less than three, or more than seven;

6. The place in this State where their office for the transaction of business is located;

7. The term of existence of such corporation, which shall not exceed thirty years; which certificate shall be acknowledged as deeds are required to be acknowledged, and recorded in the office of the clerk of the county in which the office of said company for the transaction of business is located, and a copy thereof filed in the office of the Secretary of State.

SEC. 3. Upon complying with the provisions of the last preceding section, such company shall be a body corporate, by the name designated in said certificate, and as such shall be capable of suing and being sued in all courts and in all manner of actions, and may have a common seal, and may by by-laws prescribe the manner of calling and conducting the meetings of the stockholders, and shall possess the powers and privileges, and be subject

to the provisions contained in chapter fifty-five, of title ten, of the revised statutes of A. D. one thousand eight hundred and forty-six, entitled "General provisions relating to corporations," as far as the same shall be applicable, and not inconsistent with the provisions of this act.

SEC. 4. No company formed or created under this act shall be authorized to improve the navigation of any stream under the provisions of this act, until they shall have obtained the assent, in writing, of the Governor and Attorney General of this State.

SEC. 5. After the organization of any such company as aforesaid, they may prepare a map of the section or sections of the stream or streams the navigation of which they propose to improve, and a plan for the improvement of the same, which shall show and set forth the several points in such stream where improvements are proposed to be made, and the nature and character of such improvements. Upon any such map and plan being submitted to the said board of control, at any meeting thereof, its hall be the duty of said board to examine the same; and, if in the opinion of such board the construction of such improvement will be a public benefit, and that said company is a proper company to make the same, they shall endorse upon such map and plan their approval thereof, and their assent to the construction of the improvements proposed, and shall fix the time within which the same

shall be completed by such company. Said board of control may, in their discretion, alter or amend such plan before approving the same, or may, at any time after such approval, consent to the alteration of such plans, upon the petition of the company which shall have presented the same.

SEC. 6. The business and property of such company shall be managed and directed by a board of not less than three nor more than seven directors, who, after the first year, shall be elected annually, or once in two years, as the by-laws of said company shall direct, and at such time and place as said by-laws may direct; and public notice shall be given of the time and place of holding such election not less than twenty days previous thereto, in such a manner as the by-laws of suc company may direct; the election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy. All elections shall be by ballot, and each stockholder shall be entitled to as many votes as he shall own shares of stock, and the persons having the greatest number of votes shall be directors. Whenever any vacancy shall happen in the board of directors, such vacancy shall be filled for the remainder of the term, by the remaining directors. The directors shall hold their offices for one or two years, as said by-laws may direct, and until others are elected in their places, and no person shall be a director unless he is a stockholder in said company.

SEC. 7. In case it shall happen that an election for directors shall not be held as provided, the said corporation shall not be for that reason dissolved, but such election shall be held on some future day to be fixed by the directors holding over, upon giving the notice therefor as in this act provided.

SEC. 8. A majority of the directors shall be a board for the transaction of business, and the acts of a majority of the board shall bind the corporation.

SEC. 9. The directors, at their first meeting after their election, shall choose, by ballot, one of their number as president, and one as treasurer, and they shall supply any vacancy in the office of president or treasurer, whenever the same shall occur.

SEC. 10. The president and directors shall have power to make and prescribe such by-laws, rules, and regulations respecting the transfer of stocks, and the management and control of the affairs and property of such corporation, as they may deem best, not inconsistent with the laws of the United States or of this State, and shall have power to appoint and employ officers, clerks, agents, and servants for conducting and carrying on the business of such incorporation, and determine their duties and salaries, and wages to be paid to them.

SEC. 11. The directors of any such company may at any time receive subscriptions to stock in

said company until the whole amount of the stock mentioned in their articles of association shall be subscribed; and whenever, in the judgment of the directors, it shall be necessary to increase the capital stock of any such company for the extension or more perfect completion of such proposed work, or to provide lands and buildings needful for its use, it shall be competent for such directors, with the approval or ratification of the holders of a majority of the capital stock, at any lawful meeting of stockholders, to provide for such increase; and in all cases where such capital stock is increased, a certificate thereof shall be signed, certified, and filed as hereinbefore required in case of the original articles of association.

SEC. 12. The directors may call in subscriptions to the capital stock of such corporation by installments, in such portions, and at such times and places as they shall think proper, by giving notice thereof as the by-laws shall prescribe; and in case any stockholder shall neglect or refuse payment of any such installment for the space of sixty days after the same shall become due and payable, and after he shall have been notified thereof, the stock of such delinquent stockholder may be sold by the directors at public auction, at the office of the secretary of the corporation, giving a least thirty days' notice in some newspaper published in the county: *Provided*, That if said stockholder shall reside in this State, the stock shall be sold at the business

office of said corporation, in the county in which they are doing business, giving at least thirty days' notice thereof in some newspaper published in the county; if no newspaper be published in the county in which such corporation transacts their business, then it shall be published in the newspaper in the city of Detroit which shall have at the time the largest circulation; and the proceeds of such sale shall be first applied in payment of the installment called for, and the expenses on the same, and the residue shall be refunded to the owner thereof; and such sale shall entitle the purchaser to all the rights of a stockholder, to the extent of the shares so bought.

SEC. 13. Every such corporation organized as hereinbefore prescribed, may make the improvements thus set forth in said plans, after the same shall have been approved by said board of control, and for this purpose shall have the following powers, and be subject to the liabilities and restrictions following, that is to say:

1. To cause such examinations and surveys for the proposed improvements, whether of dams, canals, or deepening of the channel, to be made along the stream whose navigation it is proposed to improve, as may be necessary to prepare for the work to be done, and by their officers, agents, and servants, to enter upon the lands or waters of any person or company, but subject to liability for all damages which they shall do thereto;

2. To purchase, and by voluntary grants and donations, to receive, enter upon, take hold, and use all such lands and real estate, and other property as may be necessary for the construction and maintenance of the work proposed in the approved plans of such company;

3. To divert into such stream to be improved, waters from any lake or lakes in the vicinity thereof, by canals to be constructed for that purpose; to divert the water from the present channel of the stream to be improved, by cutting across bends in said river; to flood lands by constructing the necessary dams, according to the plans approved as aforesaid, and to enter upon, take, and use any lands which may be necessary for the purpose of constructing and maintaining such works and improvements: *Provided*, That the necessity for such diversion of the water, flooding of lands, and of taking such lands for such purposes, and the damages to be paid therefor, in each case of diversion of water, flooding of land, or taking of the same, shall be ascertained, and such damages paid, as provided for in sections thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, and twenty-five of an act entitled "An act to provide for the formation of companies to construct plank roads," approved April eighth, one thousand eight hundred and fifty-one, being sections one thousand eight hundred and ninety-four

to one thousand nine hundred and five inclusive, of the compiled laws, and the amendments thereto.

SEC. 14. It shall be the duty of such company to complete the improvements contemplated by the plans approved, as aforesaid, within the time which shall be prescribed by the said board of control, at the time said plans shall be approved by said board of control, and in case of failure so to do, said company shall forfeit all right to collect tolls of any person or persons whatever, who shall use for the purposes of navigation the improvements made by such company, unless the time for completing the same shall have been previously extended by said board of control, upon good cause shown.

SEC. 15. Whenever any portion of said work shall be completed to the satisfaction of said board of control, and it is so far useful that in the opinion of said board of control, tolls should be paid for the use thereof, said board may fix the tolls to be paid for the use of such portion, until the whole of said work is completed; and whenever said improvements have been completed and accepted by said board of control, the rates of toll or fare which any company organized under this act may charge for running vessels, boats, rafts, timbers, logs, or lumber through such improved stream, shall be fixed by said board of control, and may be graduated with reference to the distance run upon said river, and shall not be increased without the

consent of said board, but may be changed from time to time by such board. But such toll shall not at any time be increased so that the sum shall amount to more than fifteen per cent. a year upon the cost of such improvements, after deducting necessary expenses, including repairs, and the collection of such tolls shall be confined strictly to that part or portion of a river or stream so improved, and to that class of floatables benefited by the improvement; and nothing in this act shall be construed to give jurisdiction to any corporation over any portion of a river or stream other than the portion specifically improved by such corporation.

SEC. 16. Any stream improved under this act shall be open to all persons for use, upon the payment of tolls prescribed as aforesaid, for the passage of vessels, boats, logs, rafts, timber and lumber through such improved stream or waters, and uniform rates of toll shall be charged to all persons, whether stockholders in such company or not.

SEC. 17. Whenever said tolls are prescribed as aforesaid, the directors thereof may collect the same from persons using such improved portions of such stream or waters, at such places and in such manner as said company may deem expedient.

SEC. 18. Such company shall have a lien upon all logs, rafts, timber, or lumber, or other floatables

driven, rafted, or run through such stream or waters upon which toll shall be due, for such toll, and may sell a sufficient quantity of such logs, timber or lumber, or other floatables to satisfy said claim or demand, with the expense of such sale, at public auction, on not less than ten days' notice, either personally served upon such owner, or posted in three or more conspicuous places in the township where such logs are held, and in either case by posting a like notice, also, in the office of such company, of the mark, description, and supposed owner of such logs, timber or lumber, and the charges for which the same is to be sold.

SEC. 19. The board of directors of any such company shall at all times after commencing the collection of any tolls from persons using said improved stream or waters, keep such portions of the stream or waters clear of all unnecessary obstructions, and in good condition for the passage of rafts, timber, logs, lumber, vessels or boats for which toll is charged, and in case of any dilapidation or obstruction which is calculated to endanger or delay the passage of rafts, timber, logs or lumber, boats or vessels as aforesaid, it shall be the duty of the board of directors, without unnecessary delay, to make such repairs as shall restore such stream or waters to their proper condition; and in case said board of directors shall fail to comply with the provisions of this section, the corporation shall, for every such neglect or refusal, be liable to a forfeit-

ure of one hundred dollars, to be recovered in an an action of debt, by any person aggrieved or injured thereby: *Provided*, That in all cases one of said board of directors shall first have been notified of such defect, and the necessary time for its repair shall have elapsed after such notice and before the commencement of such suit.

SEC. 20. If any person shall willfully obstruct any stream, or waters improved under the provisions of this act, or any part thereof, or shall willfully destroy or injure any buildings, piers, dams, fixtures, banks, or other constructions in use upon the same, belonging to said company, such person or persons so offending shall, for every offense, be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not more than one year, in the discretion of the court

SEC. 21. If any person or persons shall put or cause to be put into said stream or water, any logs, timber or lumber, and shall not make adequate provisions and put on sufficient force for breaking jams of such logs, timber or lumber in or upon such stream or waters, or for running, rafting or driving the same, and thereby obstructing the floatage or navigation, it shall be lawful for such company to cause such jams to be broken, and such logs, lumber or timbers to be run, driven, boomed, rafted or secured, at the charge and expense of the person or persons owning said logs, timber or lumber; and

said company shall have a lien upon such logs, timber or lumber, as shall be sufficient to pay and satisfy all just and reasonable charges therefor, and expense and cost thereof, and shall be entitled to take and retain possession of such logs, timber or lumber, or so much thereof as may be necessary to satisfy the amount of such charges for breaking such jams, and for driving, booming, rafting and running of said logs, timber or lumber, and expenses and costs thereon, until the same be satisfied and paid; and such corporation shall proceed to collect such charges, costs and expenses, in the manner hereinafter prescribed.

SEC. 22. Any such corporation claiming any lien may bring an action of assumpsit against the owner of such property, to determine and satisfy the amount of such lien. The proceedings in such action shall be in accordance with the practice of the courts in which such action is commenced, in actions of assumpsit, and the property so held may be levied upon and sold to satisfy any judgment which may be rendered against such owner, together with all costs of such suit, including the costs and expenses of providing for the care and safety of such property.

SEC. 23. If the owner of such logs, timber or other floatables cannot be ascertained, or is without the jurisdiction of the court, the proceeding to ascertain and determine the amount of such lien may be against the property, and commenced by

filing the petition of said corporation claiming such lien, in the proper court, which shall contain a statement of the nature and amount of the claim and a description of the property seized, and that the owner of such property is unknown, or is without the jurisdiction of the court, and praying for a judgment against such property for the amount of such claim, which petition shall be verified by the oath of the president of such corporation filing the same, or its agent or attorney. The plaintiff shall thereupon, and before any trial shall be had, or judgment rendered in such proceeding, cause a notice to be published for four successive weeks, at least once in each week, in some newspaper printed and circulated in such county, or if none is printed and circulated in such county, then in such other newspaper published in this State as such court shall direct, which notice shall state the title of the court, the name of the plaintiff, the name of the owner of the property taken, if known, the nature and amount of the claim, and the description of the property upon which the lien is sought to be enforced. The owner of such property shall have a right to appear and defend in such proceedings, at any time before judgment, upon such terms as the court shall direct; and in case of his appearance, an issue shall thereupon be formed as in actions of assumpsit, and all subsequent proceedings in such case shall be in accordance with the practice of such court in actions of assumpsit. If the owner shall fail to appear in such proceeding, the

court may proceed *ex parte* to hear, try and determine the facts alleged in such petition, and render such judgment thereon as justice may require. If judgment shall be rendered in favor of such plaintiff, the court shall thereupon order that the property covered by such lien, or as much thereof as may be necessary, be sold to satisfy the amount of such judgment, with costs.

SEC. 24. On or before the first Monday in January in each year, it shall be the duty of the directors of every company formed under this act, to report to the Secretary of State, under the oath of at least two of the directors, the length of the stream or waters so improved, the cost of such improvements, the amount of money expended, the amount of their capital, how much of the same is paid in, and how much is expended, the whole amount of tolls or earnings expended on such improvement, the amount received during the previous year for tolls, and from all other sources, stating each separately, the amount set apart for repairs, the amount of dividends made, and the amount of indebtedness of such company, specifying the object for which such indebtedness accrued.

SEC. 25. Each and every company formed under this act, shall pay to the Treasurer of the State of Michigan an annual tax, at the rate of one per cent. on the whole amount of capital paid in upon the capital stock of said company, which tax shall be

estimated upon the last preceding report of said company, and shall be paid to the said Treasurer on the first Monday in July of each year, and shall be in lieu of all other taxes upon all the property of said company.

SEC. 26. The stockholders of every company organized in pursuance of this act, shall be jointly and severally personally liable for the payment of all debts and demands against such association, which shall be contracted, or which shall be or shall become due during the time of their holding such stocks, for any labor or services done or performed for such company; but no stockholder shall be proceeded against for the collection of any debt or demand against such company, until judgment thereon shall have been obtained against the association, and an execution on such judgment shall have been returned unsatisfied, in whole or in part, or unless such association shall be dissolved.

SEC. 27. The shares of any company formed under this act shall be deemed personal property, and may be transferred as shall be prescribed by the by-laws of such company.

SEC. 28. Service of any legal process against any such corporation may be made on the president, treasurer, or upon any one of the directors of such company.

SEC. 29. All companies formed under this act shall at all times be subject to all general laws in force, relative to corporations.

SEC. 30. This act shall take immediate effect.

Approved April 5, 1869.

SUPREME COURT
OF THE
UNITED STATES.

October Term, 1886.

THE MANISTEE RIVER IMPROVEMENT COMPANY, PLAINTIFF AND APPELLEE, vs. LOUIS SANDS, DEFENDANT AND APPELLANT,	No. 313.
SAME vs. CHARLES F. RUGGLES,	No. 314.
SAME vs. JAMES DEMPSEY, ET AL.,	No. 312.

ERROR TO SUPREME COURT OF MICHIGAN.

BRIEF
OF
RAMSDELL & BENEDICT,
ATTORNEYS FOR PLAINTIFF AND APPELLEE.

J. B. Ramsdell of Counsel

MANISTEE, MICH.
TIMES-SENTINEL JOB PRINTING DEPARTMENT.
1886.

SUPREME COURT.

—OF THE—

UNITED STATES.

THE MANISTEE RIVER IMPROVEMENT CO.,
Plaintiff and Appellee,
vs.
LOUIS SANDS,
Defendant and Appellant.

Error to Michigan.

BRIEF OF RAMSDELL & BENEDICT,

PLAINTIFF'S ATTORNEYS.

STATEMENT.

The above entitled case, No. 313, also Nos. 312 and 314, involve the same assignments of error; No. 312, in which James Dempsey and others are defendants, has been settled since transfer to this Court.

This Brief discusses Nos. 313 and 314 as one case.

These actions were brought in the Circuit Court for the county of Manistee, Michigan, and resulted in judgments for the plaintiff, were transfered by writ of error to the Supreme Court of Michigan, and judgments affirmed.

The action against the defendant, Louis Sands, and the same is true in the other cases, was in assumpsit, as provided by the statute of Michigan (Howell's Stat., 3861), to collect tolls for the use of the improvements of the Manistee river by the defendant in the years 1878, 1879, 1880 and 1881.

The Manistee river is a stream wholly within the State of Michigan; rises in the upper part of the lower peninsula, and flowing south-west discharges into Lake Michigan.

The Company is a corporation of the State of Michigan, organized April 4, 1870, under an act of the Legislature of that State, approved April 5, 1869, for the purpose or improving the navigation of said river. The organization was under Howell's Stat. (3845–3873), being chapter one hundred and eleven, entitled "River Navigation Improvement Companies." The declaration alleges, and the proofs show, a compliance on the part of the plaintiff, in its organization, with all the requirements of the statute in force at that time.

1. Its incorporation.

2. The preparation of a map and plans of improvement.

3. The submission of the plan to the Governor and the Attorney General of the State of Michigan, and their approval thereof.

4. The submission of the plans and map to a Board designated in the statute for that purpose, viz: The Board of Control of the St. Mary's Falls Ship Canal, and the approval thereof by the said Board.

5. The resolution of the said Board of Control stating that in their opinion the construction of said improvement as proposed by the plans would be a public benefit, and that plaintiff's corporation was a proper company to make the improvement, and their assent to the same on behalf of the State of Michigan, and their action fixing the time for the completion of the same by sections.

The declaration proceeded to allege that the improvements of the river were made in accordance with such plans and within the time required by the Board of Control, with such modifications and changes as were from time to time required by the Board, as provided in the aforesaid act of the Legislature.

The proposed improvements consisted mainly in cutting channels through twenty-two places in the river designated as "jams," and in confining the

waters of the river within the channels by embankments, and in the erection of dams to aid navigation.

The work of improvement had been fully completed, with the exception of one dam, which was not required to be completed until after the filing of the declaration.

The work had been completed as aforesaid to the satisfaction of the Board of Control, and it was so far useful to the public, that in the opinion of said Board tolls should be paid for its use, and the Board had, under the statute aforesaid, fixed and determined the rates of toll to be paid for the use of the improvements in running saw logs and timber for the years 1877 to 1881 inclusive, these rates ranging from 5 to 15 cents per thousand feet, board measure, according to the distance that the logs were run through the different sections of the improvement.

The declaration also alleges that after rates of toll had been fixed for the years 1877, 1878, 1879, to-wit: the 11th day of February, 1880, in a suit brought on behalf of the people of the State of Michigan against the plaintiff, it was adjudged and determined that the said plaintiff was such a corporation as aforesaid; that it had made said improvements; that said improvements were completed to the satisfaction of said Board, and were accepted by said Board; and that the said Board had determined that in their

opinion such improvements were useful, and that tolls should be paid for the use thereof; and that said tolls were duly fixed by said Board for said years, and that said plaintiff was entitled to collect said tolls, and such tolls as were or should thereafter be fixed by said Board for the use of the portion of said river improved as aforesaid, in the running of logs through the same.

And the plaintiff avers that it had and now has such right, and is entitled to collect such tolls.

And plaintiff further avers that the said defendant put into the Manistee river, and caused the same to be floated down the river, through and upon the portion thereof improved as aforesaid, in the years 1878, 1879, 1880 and 1881, large quantities of logs, to-wit: 78,711,041 feet, board measure; and in running said logs during each of said years, the said defendant used and had the benefit of said improvement, and thereupon the said defendant became and was liable to pay the said plaintiff the rates of toll aforesaid, amounting to the sum of $9,253.25, of which there remained due the sum of $8,105.84 with accrued interest.

The defendant plead the general issue and gave notice of several special defenses, none of which can be considered in this Court, and, in fact, no evidence was offered to sustain their special plea, the only

evidence offered by defendant on the trial being evidence tending to show that the scale used by the plaintiff of the logs was excessive, and that the tolls receivable under the statute were ten per cent less than the amount claimed by the plaintiff.

The errors assigned by the ~~plaintiff~~ defendant are that the statute of Michigan above referred to, and under authority of which the plaintiff demands these tolls, is in conflict:

First, With Article 1, Section 10, of the Constitution of the United States, which provides that "no State shall pass any law impairing the obligations of contracts," it being claimed that said law sought to impair the obligations of the contract or ordinance of July 13, 1787, entitled "An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio;" reference being had to the last clause of Article IV., as follows: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost or duty therefor."

Second: That it was in conflict with the fifth amendment of the Constitution of the United States,

wherein it provides that "no person should be deprived of life, liberty or property, without due process of law."

Third; That it was opposed to the fourteenth amendment of the Constitution of the United States: "Nor shall any State deprive anyone of life, liberty or property, without due process of law;" it being claimed that said statute of Control arbitrary and unlimited power to levy tolls Michigan purported to give the said Board upon logs passing through said improved portions of the Manistee river, and provided no means by which the parties owning such logs might contest either the fixing of tolls in the first instance, or the validity or propriety of the rates fixed afterwards.

The opinion of the Supreme Court of Michigan, against which error is assigned in this Court, is found in 53 Michigan, p. 593.

ARGUMENT.

I.

The claim made by the defendant that the statute of Michigan conflicts with the ordinance of July 13, 1787, which provides for the navigation of the navigable waters leading into the Mississippi and St. Lawrence without taxes, imposts or duty, has been fully disposed of by the decisions of this Court. It has been repeatedly held that the ordinance of 1787 was superceded by the Constitution of the United States, which was submitted to the States for ratification by the Philadelphia convention on the 17th day of September, 1787, and ratified by nine States (being the number required in said Constitution) between the day of its submission and September 13, 1788; that it is also superceded by the several acts of Congress admitting the States formed from the Northwest territory into the Union of States on an equal footing with the original States in all respects; the act admitting the State of Michigan bearing date January 26, 1837.

Escanaba Co. vs. Chicago, 107 U. S., 678.

See also opinion of Harlan, J., Huse vs. Glover, 15 Fed. Rep., 292.

Also opinion of Miller, J., in Woodman vs. Kilbourn M'f'g. Co., 1 Bissel, 549.

II.

The objection to the Michigan statute based on the fifth amendment to the Constitution of the United States may also be summarily disposed of by reference to adjudged cases. That amendment is considered to be a limitation on the powers of Congress, and not a limitation on State authority.

In Kelly vs. Pittsburg, 104 U. S., 78, Miller, J., delivering the opinion of the Court, says:

"As regards the effect of the fifth amendment of the Constitution, it has always been held to be a restriction upon the powers of the Federal government, and to have no reference to the exercise of such powers by the State governments. See Withers vs. Buckley, 20 How., 84; Davidson vs. New Orleans, 96 U. S., 97. We need, therefore, give the first assignment no further consideration."

III.

The objection to the Michigan statute, based upon the fourteenth amendment to the Federal Constitution, is alike untenable. It is claimed by the defendant that the statute attempts to give the Board of Control unlimited and arbitrary power to levy tolls upon logs passing through the improvement. This is in no sense true. Section 15 of the act reads as follows:

NOTE.

Since the within brief was printed, all the questions at issue were decided in favor of the Manistee River Improvement Company, in two cases tried in The Circuit Court of the United States, Eastern District of Wisconsin.

The Manistee River Improvement Co.
vs.
William H. Bradley.

Same
vs.
William H. Bradley, et al.

Cases tried by District Judge Dyer, and affirmed, on motion for new trial, by Circuit Judge Gresham.

The case of Huse vs. Glover, referred to in the brief, has also been affirmed in the Supreme Court of the United States.

Huse vs. Glover, 119 U. S., 543.

also
Cincinnati Packet Co.
vs.
Bay
121 U. S. 444

"Whenever any portion of said work shall be completed to the satisfaction of said Board of Control, and it is so far useful that in the opinion of said Board of Control tolls should be paid for the use thereof, said Board may fix the tolls to be paid for the use of such portion until the whole of said work is completed; and whenever said improvements have been completed and accepted by said Board of Control, the rates of toll which any company organized under this act may charge for running rafts, timber, logs or lumber through said improved streams shall be fixed by said Board of Control, and may be graduated with reference to the distance run upon the portion of said stream improved by said company, and shall not be increased without the consent of the said Board, but may be changed from time to time by said Board; but such toll shall not at any time be increased so that the sum shall amount to more than fifteen per cent a year upon the actual cost of such improvements, after deducting the necessary expenses and repairs; and the said Board shall, as far as may be practicable, so fix the rates of toll on timber, logs and lumber that the same shall not at any time exceed the sum of twenty-five cents per thousand feet, board measure, on any stream where ten millions of feet or less are run in any one year; twenty cents per thousand feet, board measure, on any stream where thirty millions of feet or less are run in any one year; nor more than fifteen cents per thousand feet, board measure, on any stream where from thirty to fifty millions of feet are run in any one year; nor more than ten cents per thousand feet, board measure, on any stream where from fifty to one hundered millions of feet are run in any

one year; nor more than five cents per thousand feet, board measure, on any stream where from one to two hundred millions of feet or more are run in any one year; and the collection of such tolls shall be confined strictly to that part or portion of a river or stream improved, and to that class of floatables benefitted by the improvement; and nothing in this act shall be construed to give jurisdiction to any corporation over any portion of a river or stream, other than the part specifically improved by such corporation. Such corporation shall cause to be made out and filed with said Board of Control, at or before its meeting on the last Wednesday in March of each year, the affidavit of its president or one of its directors, setting forth in detail, upon his best information and belief, what amount of timber, logs and lumber will be run through any section or sections of the river improved by the company during that year, and that the official has made due and reasonable inquiry on the subject from persons lumbering on the river and otherwise."

Here we see that the Board of Control does not fix the tolls in any arbitrary or unlimited manner. The tolls are confined to that portion of the river improved, and to that class of floatables benefitted, and are proportioned to the distance run on the river, so as not to exceed in any case 25 cents per thousand feet, board measure, and so as not to produce in any case more than 15 per cent a year upon the actual cost of improvement, after deducting necessary expenses and repairs.

A franchise of taking tolls is granted by the Legislature in the charter of the company. It is based on the principle of a just and equivalent compensation for the money expended in the improvement. The life of the corporation cannot exceed thirty years (Section 2), during which period the law permits to the company an income of not to exceed 15 per cent a year on their actual capital invested, to be paid only by those who have availed themselves of the use of the improvement.

The Board of Control are simply a supervisory committee, appointed by the Legislature, whose duty it is to inspect the works and keep the tolls within the statutory limits.

The Board of Control is the agent of the State to institute the proper investigations. They examine the work as it progresses, and when it is so far progressed as in their opinion to be useful to the public, they, in behalf of the State, recognize that fact, and fix the toll proportionately to the benefit, so far as it is practicable, in their judgment to be done, according to the rates per thousand suggested in the statute, and so that the income of the company shall be limited to 15 per cent, intended to be given on the investment. At the completion of the work, the Board of Control accept it, just as a building committee declares the completion of a public work, such, for

example, as the State capitol, placed under their supervision.

The power possessed by this Board is precisely such as is ordinarily intrusted to Boards of Public Works.

It is said, in Cooley's Constitutional Limitations, page 115:

"The authority that makes the laws has large discretion in determining the means through which they shall be executed, and the performance of any duties which they may provide for by law, they may refer either to the Chief Executive of the State, or, at their option, to any other executive or ministerial officer, or even a person specially named for the duty."

The Legislature might have simply authorized the directors of the Improvement Company to reimburse the company by tolls not exceeding the percentage allowed on their investment; but in such case there was liability to abuse.

An administrative Board composed, as in this case, of the Governor of the State, the Auditor General and the State Treasurer, was calculated to administer this law impartially between the people and the corporation. The official position of the Board seemed to be ample guarantee that grevious wrong against the public would not go long unredressed.

That the State has plenery power to improve the navigation of its internal rivers, at all events in the absence of any act of Congress, assuming power on

the part of the general government, has been constantly asserted in both State and Federal Courts. The power of Congress to legislate on the subject at all must be referred to that clause in the Constitution which gives it authority to regulate commerce with foreign nations, and among the several States, and with the Indian tribes (Article I., section VIII. and clause 3), and would not seem to be applicable to a stream like the Manistee river, not a link in inter-state or foreign commerce, but wholly internal to the State, and adapted merely to the navigation of logs and timber.

Pollard vs. Hagan, 3 How., 212.
Withers vs. Buckley, 20 How., 84.
Willson vs. Blackbird Creek Marsh Co., 2 Pet., 245.
Gillman vs. Philadelphia, 3 Wall., 713.
Pond vs. Turk, 95 U. S., at page 462.
County of Mobile vs. Kimball, 102 U. S., 691.
Escanaba Co. vs. Chicago, 107 U. S., 678.

These cases fully illustrate and establish the power of the State to improve the navigation of its streams within its territory, to construct bridges and dams, to authorize booms, wharves and buoys to be constructed in such rivers, and to regulate generally the manner of using the stream, and that there is no difference between the authority which may be exercised by the

thirteen States of the Union and those which have since been admitted. The authority of the State, also, to impose tolls as a compensation for the use of the improvements to navigation, which the State has authorized, is equally well established.

The Constitution of Michigan contains the following clause, Article XVIII., Sec. 4:

"No navigable stream in this State shall be either abridged or dammed without authority from the Board of Supervisors of the proper county, under the provisions of law. No such law shall prejudice the rights of individuals to the free navigation of such streams, *or preclude the State from the further improvement of the navigation of such streams.*"

Under this clause of the Constitution, the Supreme Court of the State has repeatedly affirmed the power of the State to improve the navigation of its streams, and as improvements cannot be made without revenue, they have held that tolls might be required for the enjoyment of that which the State has expended in giving a new value to the stream, and in producing a navigability which did not exist before.

Benjamin vs. Manistee River Improvement Co., 42 Mich., 628.

Nelson vs. Cheboygan Slack Water Navigation Co., 44 Mich., at page 10.

Manistee River Improvement Co. vs. Lamport, 49 Mich., 442.

These decisions are in full harmony with those of other States, and with the decisions of the Federal Court.

The County of Mobile vs. Kimball, 102 U. S., 691: In this case an act of the Legislature of Alabama provided for the improvement of the river, bay and harbor of Mobile, by the Board of Improvement appointed in the act. In this act, certain officials of the city of Mobile were to issue the bonds of the city, to be expended by the board in improvement, and reimbursed by tolls levied on vessels and other water craft. It was claimed that this statute was void as a regulation of commerce, but it was held by the Federal Courts to be neither in conflict with the Constitution of Alabama or the Federal Constitution. The Court says:

"The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety, they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government."

Huse vs. Glover, Circuit Court of the Northern District of Illinois, 15 Fed. Rep., 292, was a bill in

equity. The defendants were commissioners appointed by authority of the statutes of Illinois, to construct dams and locks on the Illinois river, with authority to establish and collect reasonable tolls upon the passage and use of the locks by boats and vessels.

The complainants were owners of several steamboats and barges on the Illinois river, and the bill prayed an injunction against the collection of tolls.

It was claimed that the locks and dams were so constructed as not only not to aid navigation, but to constitute an actual impediment, and that the statute was in conflict with the Ordinance of 1789; also, Article I., Section 10, clause 2 of the Federal Constitution, prohibiting any State, without consent of Congress, from laying any duty of tonnage; also, Article I., section 8, clause 3 of the Constitution, which invests Congress with the power to regulate inter-State and foreign commerce.

The Court, Harlan, J., sustained the statute, citing, as conclusive authority, the decisions of the Supreme Court of the United States. For other examples, we refer to:

Benjamin vs. Manistee River Improvement Co., Supra.
Manistee River Imp. Co. vs. Lamport, 49 Mich., 442.
Wisconsin River Imp. Co. vs. Manson, 43 Wis., 255.
Spooner vs. McConnell, 1 McLean, 352.
Palmer vs. Cuyahoga Co. 3 Id., 226.

Kellogg vs. Union Co., 12 Conn., 7.
Thames Bank vs. Lovel, 18 Id., 500.
Commissioners of Sinking Fund vs. Green and Barren River Navigation Co., Ky. Court Appeals, Oct. 22, 1880, II. Reporter, 394.
McReynolds vs. Smallhouse, 8 Bush., 447.
Carondelet Canal Navigation Co. vs. Parker, 29 La., Ann. 430.

In none of these cases was any provision for the persons who might be called upon to pay tolls, to have opportunity to be heard in fixing the tolls.

The law established by the foregoing cases is that the State may improve or authorize the improvement of navigable streams, and impose tolls or authorize the imposing of tolls for the use of the improvement; the tolls being a compensation only for the use of the improvements.

The same result has been reached in the wharf cases. The same principles involved in the defendant's objections to the statute of this State, exist in the case of the statutes authorizing the construction of wharves upon navigable streams, and imposing tolls for the use of the wharves. The wharves are improvements of the streams, and of the navigation of the streams, furnishing improved or additional means of navigation.

The Supreme Court of the United States in a series of cases hold that the States have power to authorize municipal corporations to construct wharves upon the navigable streams, to impose tolls or charges upon vessels using such wharves, to determine the rate of toll, to fix the rate upon the tonnage of the vessels, and to collect them of the parties using the wharves. In these cases the power of the State, both under the Constitution of the United States and under the ordinance of 1787, has been many times considered and decided.

Packet Co. vs. Keokuk, 95 U. S., 80.
Packet Co. vs. St. Louis, 100 Id., 423.
Vicksburg vs. Tobin, 100 Id., 430.
Packet Co. vs. Catlettsburg, 105 Id., 559.
Transportation Co. vs. Parkersburg, 107 Id., 691.

In the case of the Packet Co. vs. Catlettsburg, the Legislature of Kentucky had authorized the town of Catlettsburg to erect wharves and docks, to fix the rate of wharfage, and regulate the stationing or anchoring of vessels within the town limits. The town constructed the wharves on the Ohio river, and by ordinance required all steamboats arriving at the town to land at such wharves, and at no other points within the limits of the town, except by the written consent of the wharf master, and fixed the rates of

charges for landing at the wharves on the basis of the tonnage of the boats; *a penalty was imposed for landing at any other point.*

The suit was to enjoin the town from collecting "taxes" from the Packet Company's boats while landing at the unimproved shores and at points other than the town wharves, from collecting excessive taxes for landing at the wharves, and from the enforcement of the provisions of the ordinance requiring them to land at the defendant's wharves.

The relief sought was denied.

The Court held that a city or town situated on navigable waters might build and own a wharf suitable for vessels to land at, and might exact reasonable compensation "for the facilities thus afforded to vessels by the use of such wharves," *and might prescribe the places where* steamboats, vessels without steam, rafts and flat boats should land. The Court says:

"We are of the opinion that there is nothing in the ordinances of the town of Catlettsburg, complained of, *authorized, as they clearly are, by the statute of Kentucky,* which is repugnant to the Constitution of the United States."

In the case of Transportation Co. vs. Parkersburg, the city of Parkersburg had constructed wharves on the Ohio river, and, by ordinance, prescribed rates of

wharfage on vessels "that may discharge or receive freight, or land on, or anchor at or in front of any public landing or wharf belonging to the city, for the purpose of discharging or receiving freight."

The suit was to restrain the collection of wharfage, and to recover back money previously paid for wharfage. The suit raised constitutional objections to the imposing of any charge for the wharfage and averred that the rates charged were extortionate and oppressive, that the cost of the wharf had been collected over and over again, and the moneys raised by means of these wharfage dues were levied to increase the revenues of the city, and for other purposes than maintaining the wharves.

The Court affirmed the Constitutional right to collect wharfage, and held that "wharves, levees and landing places are essential to commerce *no less than a navigable channel and a clear river;*" that "Congress has never yet interposed to supervise their administration, it has hitherto *left this exclusively to the States*;" that in cases of abuse, Congress might interpose and make regulations to prevent such abuses, "but until Congress has acted, the Courts of the United States can not assume control over the subject as a matter of Federal cognizance." The Court further held that if the rates were extortionate or unreasonable, the only remedy that could be applied,

either by the Courts of the United States or Courts of the States, was the remedy *provided by the laws of the States* (p 704), and "whether the reasonableness of wharfage is submitted to the determination of one forum or the other, it is only determinable by the laws of the State within whose jurisdiction the wharf is situated." (p 707.)

See also Packet Co. vs. St. Louis, 100 U. S., at page 424, for statement of Constitutional and other objections which were made to the imposing of wharf charges.

From the foregoing decisions it results that by means of State legislation a party navigating any of the public rivers may be prohibited from landing at any point along the streams except at a wharf, and for the use of a wharf be compelled to pay tolls or charges, in respect to which he had no hearing or opportunity for hearing.

As stated in those cases, landing places are as necessary to navigation as a channel or open stream; without the right to land, to receive or discharge freight and passengers, the right of navigation is of no value.

The above decisions cover the grounds of the defense made by the defendant's objections. If those objections are good, these decisions are wrong.

It is true that in none of those cases the objection was made that imposing the wharf charges was a taking of property without due process of law, but in all of them objections were made to the validity of the State legislation, on the ground of violating some of the provisions of the Constitution of the United States; and if it could be said that this particular clause of the Constitution could have any reference to such charges, it would seem that it ought to have occurred to the counsel or Court during a litigation against the charges so extended and determined.

It is insisted that the statute is void, in that it provides *no notice* to be given to said parties in fixing the said tolls, and no means by which an action of the Board of Control may be reviewed.

The law provides something equivalent to a prior notice and practically much better, in this provision of section 15:

"Such tolls shall not be increased without the consent of said Board, but may be changed from time to time by said Board."

The practical effect and purpose of this provision is that this supervisory Board is always accessible and is always ready to hear any complaint which may be made by the log owners. There is always the opportunity and the power to review their former action, and redress any injustice done.

The term, "due process of law," in any given case, must have respect to the cause and purpose for which property is taken, and if the means are suitable to the ends of justice in the special case, it is to be deemed a due process of law. Here the Legislature fixes the tolls at 15 per cent, net, of the income, and appoints a Board of high officials to see that the rates are kept within that limit, and provides that that Board shall be accessible at all times with power to change the rates of toll whenever, in their opinion, justice requires. Could anything be more suitable for the accomplishment of the desired end?

On what principle can notice be required? The improvement is made by the State in its sovereign capacity. The Constitution of Michigan, heretofore referred to, expressly recognizes the right of the State to improve the navigation of its rivers. And the Supreme Court has declared that this may be done by empowering a corporation to make the improvements. The law itself fixes the tolls at a percentage on the cost of improvement, and appoints an administrative Board to keep the tolls within the limitation.

The action of the Board of Control is not such an act as requires notice. It is not a judicial act, where there is a controversy between parties which the Board of Control are to decide as a tribunal, 42 Mich.,

639. Neither is it a legislative act. All that was required in the line of legislation has been accomplished by the Legislature, who have, in the law under which the company is incorporated, enacted that the tolls should be so fixed as to yield a certain percentage. The action of the Board of Control is simply in execution of this legislative act. No one would claim that any special notice is required when the Legislature themselves fix the tolls at a definite sum per thousand feet; therefore, why should any special notice be required when they fix it at a percentage, and delegate the execution of the law to a supervisory Board?

If notice is required, to whom should it be given? Tolls are not fixed for a day or a year. They may remain fixed for several years without change, and they may be changed several times during the same year. How is the Board to know who are interested in these tolls, or who will desire to run logs at any future time? The person who to-day owns pine lands, sells to-morrow to one who never expected to be interested in that kind of property. A person who in March resides in London or St. Petersburg, beyond the reach of notice, suddenly emigrates, and in October has logs to run through the improvements on the river. Estates change by death, and infants come into possession of property under the burden of tolls,

which were imposed upon it by the law and the act of the Board of Control before they were born. These illustrations show that the resolution of the Board of Control, when passed, does not act on or affect any particular person, and that notice, either through the public newspapers or by direct service, is impossible in a multitude of cases, and therefore cannot be necessary. As in fixing the freight to be paid on railroads, or the tolls to plankroad or bridge or ferry companies, so in this case it cannot be forseen what persons or what property will be affected thereby.

The Supreme Court of Michigan in the Attorney General vs. Manistee River Improvement Co., 42 Mich., p. 639, has placed its construction upon section 15. The Court says:

"It was argued for the relator that the hearing for the establishment of tolls was in its nature a judicial hearing, of which all parties concerned were of right entitled to have notice. If that were the case, it would obviously be impossible to give notice except in some general form of publication, since it could never be known in advance who the parties interested would be. The parties concerned in the tolls would be the parties who might have occasion to make use of the river for purposes of navigation, and those might or might not be the owners of the banks, or the persons living near them, or even persons living in the State. But in truth, the fixing upon the amount of tolls is no more a judicial act than is the fixing of rates of fare or transportation by railroad, or the weight of a

bushel of grain, or the speed of the trains through towns, or the rules for the going at large of animals. A judicial act implies a controversy between parties to which the law is applied, but the fixing of tolls is only prescribing a law in advance for the government of those whose occasions may bring them within its provisions.

"As to the method in which the Board shall be satisfied what tolls are proper, the statute is not specific, and beyond requiring a report from the corporation and an estimate of the year's business, made under oath, by one of the corporate officers, it does not point out the methods by which the Board shall obtain the necessary information to enable them to perform their duties intelligently and justly. But the statute does not give to the report and affidavit any particular force as evidence, and it is undoubtedly within the province of the Board to select its own methods of obtaining such information as may be important. As in the case of all administrative duties, information may be gathered without being hampered by strictly legal rules, and the personal observation of the members may be availed of, if they shall choose. On this subject all we can say is that the statute has confided a discretionary authority to the Board of Control, which in the first place will determine the plan of the improvement, and afterwards, on evidence satisfactory to themselves, decide when the period arrived when tolls may properly be levied, and grade these tolls and change them at discretion afterwards. Over all these matters we have no control, because the law has given none, and administrative questions are not in their nature judicial questions."

The 14th amendment of the Constitution of the United States is a provision for the protection of vested rights (Cooley's Con. Lim., 358). The log owner has no such vested rights in the rivers of Michigan as will prevent the improvement of the rivers by the State. He has no such right under the Constitution and laws of Michigan, and no right under the Constitution and laws of the United States, to demand that the river should remain in its natural condition. He has no power to stop the wheels of progress. It is for the Legislature of the State to determine when improvements are desirable, and the log owner has no voice in their counsels, except his right, if a citizen, to vote for a representative in either house of the Legislature.

DUE PROCESS OF LAW. Illustrations drawn from judicial proceedings are likely to be mis leading. The fixing of tolls is not a judicial proceeding, 42 Mich., 639. In Cooley's Constitutional Limitations, page 356, the author says:

"In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, or the Legislature interferes to give direction to its title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see

whether the inference can be justified by the established rules applicable to the special case. Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

There is no analogy between the fixing of these tolls and the assessment of property for taxation, the analogy is between the levying of these tolls and any law of the State fixing a tax for general purposes. Both are acts of sovereign power. The subject may petition and remonstrate, but it is not the duty of the State to pursue each individual with notices, and to obtain his presence before its bar to give the State or its commissioners jurisdiction, as in a judicial controversy between individuals. The State may levy taxes on all the property of the State, or it may levy tolls on those who have occasion to use its improvements, and the propriety or extent of these taxes or tolls cannot be questioned.

The California railroad tax cases, County of San Mateo vs. Southern Pacific Railroad Company, 13 Fed. Rep., 722 and County of Santa Clara vs. Southern Pacific Railroad Company, 18 Fed. Rep., 385, have no bearing on this case. In these cases it is decided that the assessment of property, that is, the

ascertainment of its value, is judicial in its character, and that an opportunity must be given to be heard before the proceeding becomes fixed and final.

There is nothing new in this doctrine, it is found in all text books on taxation and in several Michigan decisions. The only analogy, as applied to this case of tolls, would be in ascertaining the quantity of logs of the defendant liable to pay tolls.

If the law authorized the Improvement Company to fix arbitrarily this amount, that is, the quantity of logs, the objection that the proceeding was not by due process of law would be of force. But for this purpose a judicial investigation is provided, viz.: an action of assumpsit to ascertain the amount of the tolls. This suit, brought by writ of error to this Court, is the "due process of law" demanded.

The log owner has a vested interest in his logs, but the plaintiff has not proceeded against the logs, nor does the statute give any summary proceedings against the logs for the collection of tolls. The action given by the statute, under which the plaintiff has proceeded in this case, is a personal action of assumpsit to obtain a judgment against the defendant to be collected by execution in the due and original course of law.

"Due process of law" is conceded to mean "according to the due course of the law," *i. e.*, "the law of the

land." The question to be answered is: Is this law consistent with the common law and with the general principles recognized in the statutes of the land at the time of the adoption of the Constitution?

In State vs. Simons, 2 Spears, 767, it is said:

"What is meant by the law of the land? In this State there can be no hesitation in saying that these words mean the common law and the statute law existing in this State at the adoption of the Constitution. Altogether they constitute a body of law, prescribing the course of law to which a freeman is to be considered amenable for all times to come."

This does not not mean that no amendment can be made to the law, but that all amendments and additions must be consistent in principle with the old law, and embody therein the same respect and protection for private law.

The theory of this constitutional provision is that all needful guarantees for life, liberty and property were found in the course of the common law. The Constitution crystalizes these principles and makes them perpetual. Any law which is defensible at the common law, as consistent with the principles and course of the common law, is in accordance with due course of law.

Sears vs. Cottrell, 5 Mich., 251.

In Hard vs. Nearing, 44 Barb., 472, the Court says:

"We think that any legal process which was originally founded in necessity, and has been consecrated by time and approved and acquiesced in by universal consent, must be considered an exception to the right of trial by jury, and is embraced in the alternative law of the land."

Laws sanctioned by time and universal acceptance; laws familiar to our fathers and the framers of the Constitution; laws to which the public rendered loyal support and obedience at the common law; or laws since enacted, but not departing from the principles of these laws which time has consecrated; such laws are not to be held invalid under the fourteenth amendment.

Because at common law, a felon might be arrested in many cases without a warrant; a traveler might lawfully abandon the impassable road and cross the adjacent fields without being liable; estrays might be taken up, and sold without judicial condemnation; a nuisance might be removed, and even the property destroyed if necessary, without legal proceedings; goods might be distrained for rent; so under our Constitution, wherein the common law has not been changed in that particular by express statute, the same acts in like circumstances are lawful.

In Weimer vs. Bunbury, 30 Mich., 201, the Court says:

"Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it. Administrative process of the customary sort is as much due process of law as judicial process. We should meet a great many unexpected and very serious embarrassments in government if this were otherwise. * * A day in court is a matter of right in judicial proceedings, but administrative proceedings rest upon different principles. The military law affords abundant illustration on this point. * * But the proceedings for the levy and collection of the public revenue afford still better illustration. Almost universally these are conducted without judicial forms, and without the intervention of the judicial authority. This has been so from time immemorial, and it has never been supposed that the tax-payer had a constitutional right to resist the tax because he had never had any judgment against him on a judicial hearing to fix its amount."

In Munn vs. Illinois, 94 U. S., 113, a law of Illinois fixing the maximum rates to be charged for the storing and handling of grain at elevators and warehouses was held to be constitutional. The Court says, (page 115):

"It has been customary in England from time immemorial, and in this country from it first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to

fix a maximum of charge to be made for services rendered, accommodations furnished and articles sold. To this day statutes are to be found in many of the States upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."

So also the "Granger Cases," Peik vs. Chicago, etc., R. R. Co., 94 U. S., 164, and several cases immediately following.

The principle of levying tolls to defray the cost and reasonable use of public improvements is a power, therefore, vested in the Legislature of the State, which has ever been exercised by the sovereign, both before and subsequent to the Constitution of the State, and at the common law, and in no possible view of the case can be in conflict with the fourteenth amendment.

If any party could appeal to the protection of this amendment, it would be the Improvement Company, who alone have vested rights in the improvements which it would be possible for the Legislature to destroy.

The decisions in the cases of San Mateo vs. The R. R. Co., and Santa Clara vs. The R. R. Co., are to these points:

1st. That the power to tax, as involved in the proceedings under review in those cases, is a power to

destroy—a power to deprive of property—and therefore due process of law must be observed.

2d. The decisions are expressly limited to the case of proceedings in which taxes are levied on *the basis of the valuation of the property taxed*, which valuation is determined in the levy of the taxes.

3d. The meaning of the term "due process of law" is determined by inquiry as to what provisions are essential for the protection of the tax-payer, as understood at the common law, or in the practices and usages of governments having their foundation in the principles of common law.

4th. That these require that before the amount which the individual tax-payer is to pay is determined and fixed against him, in the proceedings, he shall have notice and an opportunity to be heard.

5th. That this notice and opportunity to be heard does not apply to the determination or fixing of the rate of taxation upon the dollar, or upon the quantity of the property to be taxed, or the amount of the taxes to be raised; this is a legislative act with which he has nothing to do.

6th. That the notice and opportunity to be heard are confined to the part of the proceedings in which the property upon which he shall pay is *determined, and the value of such property is assessed.*

7th. A distinction is pointed out between such cases and wherein a license fee or charge is imposed for the exercise of some privilege or franchise.

See upon these points 13 Fed. Rep. at pages 431 to 437, 751, 752, 761 to 763, 766, 769; 18 Fed. Rep., pages 409 to 412, 418, 419, 425, 426.

Justice Field used this language:

"By due process of law is meant one which, following the forms of law, is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary mode prescribed by law; it must be adapted to the end to be attained; and it must give to the party to be affected an opportunity to be heard respecting the justice of the judgment sought. * * * The statute *fixes the rate of taxation* upon the value of the property, and appoints officers to estimate and appraise the value. Due process of law in the proceeding is deemed to be pursued when, *after the assessment is made by the assessing officers*, upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard respecting the *correctness of the assessment*, and to show any *errors in the valuation* committed by the officers. (13 Fed. Rep., pp. 751, 752.) In the argument of counsel the distinction of taxes for licenses and franchise, and taxation upon values, seems to have been overlooked, and because no notice is required in the former case, and no opportunity given to be heard, therefore it is contended that the rule is not sound, that notice is necessary and an opportunity of being heard, in the latter case, when an assessment is

made on property and values are found upon evidence; yet the distinction is plain and everywhere recognized. * * * Here we are not considering the compensation to be paid for franchises or privileges of any kind, whether designated as taxes or license fees, but of *taxation upon values. When these are to be ascertained, and evidence is to be taken for that purpose, and a determination is to be made which is judicial in its character, then the owner must in some form, in some tribunal, have an opportunity afforded him to be heard respecting the proceeding under which his property may be taken* before such proceeding becomes final and the valuation irrevocably fixed. * * * It was with reference to the class of cases where *values are to be found upon evidence* that we said, in the San Mateo suit, that notice and opportunity to be heard were essential to the validity of the assessment, and without which the proceeding by which the tax-payers' property was taken from him would not be due process of law."

18 Fed. Rep., pp. 409, 410.

Justice Sawyer uses this language:

"We have never contended that some species of taxes, as poll tax, license tax upon occupations, trades, etc., when the tax is specific and not *advalorum*, and does not depend upon the amount of business done, and the like, may not be levied without an opportunity to be heard. Taxes of these and like kinds operate upon all alike, and

a hearing would be of no possible avail. The law itself fixes the amount. It is a legislative act wherein the objects of taxation are indicated and amounts fixed alike for all, leaving nothing of a judicial nature to inquire into or determine; but when the tax is based upon the amount, character, condition and value of property, the amount of business, income, etc., and it is necessary to inquire into, examine, hear evidence and decide upon these matters in *order to assign to each individual his proper share of the public burden*, he is entitled to notice of some kind and an opportunity to be heard before the extent of his liability is finally and irrevocably fixed. The same observation applies to the suggestions that a party is as much entitled to be heard upon the fixing of the rate of taxation, as to ascertain the kind, amount and value of the property. *Fixing the rate is a matter of legislative discretion and legislative action*, an estimate of the amount of revenue required, the probable total amount of property upon which it must be imposed being made, the rate is fixed upon that basis, making the allowance suggested by experience for inability to collect the whole tax. But when fixed it operates equally upon all. *It is only when it is necessary to ascertain the kind, amount, condition and value of each man's property, for the purpose of apportioning his proper share of the public burden*, that it is necessary to act judicially, and to give an opportunity to be heard before the amount shall be finally and irrevocably fixed."

18 Fed. Rep. p. 426.

It is manifest that these decisions suggest no objection to the validity of the statute providing for the imposition of the tolls in question.

First. If it could be said that the imposition of these tolls involves the principles of taxation, and that therefore due process of law should be observed as understood in tax proceedings, this statute and the proceeding under it are valid.

The statute authorizes tolls to be imposed, and limits the amount or rates to be fixed, and authorizes the Board of Control within such limits to designate the rate per thousand feet. Of this proceeding the toll-payer has no right to notice or opportunity to be heard.

That of which he is entitled to notice, within the decisions, is the determination of the logs with which he should be charged as owner, and the quality of such logs in thousand feet. The determination of these matters is left by the statute to the Court and a jury in an action at law, which must be brought to recover the tolls, in case the toll-payer and the improvement company do not agree. Thereby he has notice and an opportunity to be heard. He then has an opportunity to contest both the amount of tolls which he shall be charged with, and his liability to pay any toll at all.

It has been held expressly that where such an opportunity was afforded the tax-payer, by suit, the requirement of due process of law was observed.

Hagar vs. Reclamation District, 111 U. S., 701, at 707 to 712.
Davidson vs. New Orleans, 96 Id., 97, at 104, 105.
McMillen vs. Anderson, 95 U. S., 37.

Second. But the proceeding to impose tolls is not taxation. The tolls are not taxes in any sense. They are in fact, and in decisions of the Courts sustaining them before cited, they are declared to be simply a charge for compensation for the use of improvements or facilities furnished, which improvement parties may use or not use at their option, and which tolls therefore they may become liable to pay or not liable to pay at their option.

In this respect these tolls and wharf charges are alike. To the latter the objection was made that they are taxes, but the Court say in Packet Co. vs. Catlettsburg, 105 U. S., p. 564: "The money collected is not taxes in any sense whatever." And in Packet Co. vs. Keokuk, 95 U. S., p. 84, upon same point: "A

charge for services rendered or for conveniences provided is in no sense a tax or duty."

In Carondelet Canal and Navigation Co. vs. Parker, 29 Am. R., at p. 339, the suit was to collect tolls for the improvements of the navigation of Bayou St. John, which connects Lake Pontchartrain with the Gulf of Mexico, by deepening the channel, to the objection, as made in the wharf cases, that the tolls were a tax upon tonnage. The Court say the toll is "not an impost, not a tax, not a duty, but a reasonable compensation for a real service already rendered, and which the company continues to render."

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In the Supreme Court of the United States.

SANDS

vs.

MANISTEE RIVER IMPROVEMENT CO.

RUGGLES *vs.* SAME.

Argument in Reply.

On page 11 of plaintiff's brief, it is said that the Board of Control is limited to twenty-five cents per thousand feet in its charges, but the Supreme Court of Michigan, in the Lamport case, hold that this is not a limitation upon the power of the Board, and the language of the act is "the Board shall, as far as may be practicable, fix the rates, &c.," and in the Lamport case it was held that whether the Board kept within this limit it could not be investigated.

On page 12, of plaintiff's brief, it is said that the Board is simply a supervisory committee appointed by the Legislature, whose duty it is *to inspect the works and keep the tolls within the statutory limits.*

If the Supreme Court of Michigan had so construed this law, it would not be necessary to present this case here.

The statute does not require that the Board shall *inspect the works*, and the court has decided that they need not; and also that there are no means provided to keep the Board within any limits, and if the Board exceed the amount allowed by statute it must be paid.

On page 13, of plaintiff's brief, it is said the Legislature might have authorized the company to fix its own tolls, but that this was liable to abuse.

But in 11th Mich., 139, above cited, it was held that it would not be constitutional to allow the company to fix its own tolls. If this Board is allowed to fix the tolls, *exparte*, there is the same liability to abuse.

If the company itself had been allowed to fix its own rates, we certainly would have been allowed to contest whether it had kept within the limits of the law.

The action of this Board, *exparte*, should be no more binding upon us.

In 44 Mich., 10, (*Nelson* vs. *Cheboygan*, Nav. Co., it was said by Judge Cooly that:

"As the act did not in any way limit the tolls that might be charged by the companies formed under it or confer upon any public officer or authority the right to limit them or to supervise the action of the companies in any manner, it was in effect an act to transfer to voluntary organizations the control of navigable streams with power to levy burdens upon commerce at discretion, and was probably in operation under the principles laid down in *Ames* vs. *Port Huron*, &c., Co., 11 Mich., 139."

Yet, under the interpretation given this law, the action of the company in collecting tolls is not

limited by any law, and the action of the Board is *ex parte*, and not subject to review.

In *Stockel* vs. *Ellees*, 37 Mich., 263, it is held that it is incompetent for the Legislature to deprive one of his right without notice and an opportunity to contest in Court.

Even in tax proceedings, which are from necessity exceptional, a man who has been deprived of his property, may afterwards sue for its value, upon the ground that he has been deprived of it unlawfully.

The case of *Wisconsin River Improvement Co.* vs. *Manson*, 43, Wis., 255, is cited; but the question raised here did not arise in that case. The law of Wisconsin only authorized *reasonable tolls* to be taken, and it was held that reasonable tolls could be taken. We are objecting because the Michigan law provides for the taking of tolls unreasonable and unlimited.

On p. 19, of plaintiff's brief, the case of *Packet Co.* vs. *Cattlettsburg*, is cited.

In that case the Legislature of Kentucky had authorized the town to make wharves and docks in the Ohio river, and fix the rate of wharfage therefor, and prohibit vessels landing at other points in the town. It was held that the law was valid.

On page 564, Mr. Justice MILLER said: "But, while the authority may exist in the trustees of the town, it must be conceded that an oppressive abuse in the exercise of that power may present a case in which the proper court could give relief. * * * So also while the statute authorizes, the trustees to establish the

upon its own motion, or it may refuse to act. There is nothing in the law requiring it to act at all in review of its previons action or to hear or pass upon any complaint.

As said in the former cases cited, it is not enough that a party may have a hearing as matter of favor, but the law must provide for it as matter of right.

See 13 Federal Rep., 722;
Stewart vs. *Palmer*, 74 N. Y., 183.

On p. 24 of plaintiff's brief it is said, the Legislature fixes the tolls at 15 per cent. upon the investment, and appoints a Board to keep the rates within the limits.

But it does not. This alleged limitation is held to be no limitation at all. The Board is not accessible as matter of right, and when it fixes a rate it must be paid. Its action is conclusive.

In the Lamport case, 49 Mich., 443, we tried to defend upon the ground that the tolls were excessive, that the Board *had exceeded its authority*, and that the company had fraudulently induced it to do so. We tried to show that it had exceeded 15 per cent. upon the investment, and given fifteen cents per thousand where five cents or less was authorized; but it was held that it made no limit. That the Board was discretionary, but unlimited power not reviewable, except by itself, and there was no way of enforcing such review.

See opinion of Judge Marston, pp. 443, 444.

Even if fraud had been practiced, its action could not be questioned or defended against.

We have always believed that these decisions were

wrong; but inasmuch as they are upon a construction of a Michigan statute, we suppose the Federal courts are bound by them. It was so held by Judges Gresham and Dyer in the cases cited in Wisconsin.

The question here is not whether they are right or wrong, but whether the law as thus expounded by the highest court in Michigan is valid and constitutional.

On p. 25 of plaintiff's brief it is asked why should any special notice be required when the legislature fixes a percentage and delegates the execution of the law to a supervisory Board. The reply is, that the legislature has fixed no limit which is binding upon the Board.

It has always been argued in the Michigan courts by the plaintiff, and so held by the courts, that the Board is not limited in fixing rates.

The language of Section 15, as printed in plaintiff's brief, p. 10, is: "The Board shall, as far as may be practicable, so fix."

We have always argued that there were two limitations upon the power of the Board, viz.: First, that the rate should not exceed 15 per cent. upon the cost of the improvement; second, that it should not exceed five cents per thousand on a stream where over one hundred millions of feet were run in each year (as was the case on this stream); but the court held that neither was a limitation. The action of the Board is exparte, unlimited and arbitrary.

It is said on page 26, plaintiff's brief, as well as in the Benjamin case, 42 Mich., 639, that notice given in a general way would not be effectual.

Our reply is, that does not necessarily follow, and while, within reasonable limits, the law may provide in what *manner* notice may be given, *it cannot dispense with all notice.*

It is claimed that fixing these tolls is like fixing freight rates and fares by railroad. But we submit that without notice of some kind, it would be incompetent to fix a rate in advance which would be conclusive as to its reasonableness and validity.

Besides, these logs are cut and ready for shipment before the rate is fixed. The river is the natural and only means of transportation, and an excessive and arbitary rate may amount to confiscation.

It is said on page 28, of plaintiff's brief, that the log owner has no vested right in the rivers of Michigan.

He has such right by the constitution of Michigan, and by the common law, as admitted by the Supreme Court of Michigan, and he has a vested right in his logs and his money, either of which may be unreasonably appropriated under the operation of this law.

On page 30, plaintiff's brief, it is said: "This suit is due process of law. An action of assumpsit is provided to ascertain the amount of tolls, &c."

We submit that this is an error. In this action of assumpsit only one inquiry is permitted, viz: The amount of logs run. We made that defense, and reduced the claim ten per cent. with the jury. The important part of our defense, that the charge was illegal, excessive, unreasonable and exorbitant could not be made.

An action of assumpsit where the only inquiry is how much property has the defendant, without al-

lowing any inquiry into the propriety of the plaintiff's claim against it, falls very far short of due process of law.

The plaintiff, on p. 40 of his brief, cites *Hagar* vs. *Reclamation District*, 111 U. S., 712, upon the point of due process of Law. There it is said, quoting Judge Miller:

"By due process of Law, is meant one which follows the forms of the law, is appropriate to the case and just to the parties to be affected. If found to be arbitrary, oppressive and unjust, it may be declared not to be due proof of law, pp. 108, 109."

In *Davidson* vs. *New Orleans*, 96 U. S., 97, it was said by Mr Justice Miller:

"Whenever the laws of the State provide for a mode of contesting or confirming the charge in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the case, the judgment cannot be said to deprive the the owner of his property without due process of law."

These rules are good enough for us, but what shall be said of a statute which provides for no notice, permits of no contest in the courts or elsewhere, and yet takes a portion of one man's property and gives it to another. It is not appropriate to any case, or just to any party whose property is so taken.

All charges for tolls must be reasonable.

In Gunning on Tolls, p. 25, it said with reference to "Tolls Thorough." "It lies on the person seeking to charge the public with this species of toll which is against common right, and with

respect to which the courts are exceedingly careful and jealous to prove to the satisfaction of the court and jury a good consideration for it, and a consideration will not be implied. This applies to a toll thorough for passing along a common public highway. The sea, a public navigable river, and other places over which the public have a right to pass freely at common law." And on pp. 59–60, "The King cannot grant an unreasonable toll, and it is competent to every subject of the realm to question its being reasonable, even when the exact sum is specified in the charter. This question may always be brought under discussion in whatever terms the grant may be expressed." And on p. 3, "It cannot be claimed unless the party demanding it can show that the public, whose common-law right to a free passage along the highway seeks to abridge, receive from him a good consideration for the imposition."

M. J. SMILEY,
Counsel for Pl'ff in Error.